# CONSTRUCTION INDUSTRY NEWSLETTER

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***Compliments of***
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SUBCONTRACTOR NOT ENTITLED TO 'DELAY DAMAGES'; COURT CONSIDERS CONSTRUCTION SCHEDULE IN SPECIFICATIONS TO 'SAMPLE'

*Premier-New York, Inc. v. Travelers Property Casualty Corp.*

IN AN ACTION in New York County Supreme Court arising out of the construction of a new 'vertical campus" for Baruch College, a subcontractor sued the general contractor and surety for delay damages totaling $381,917.93.

The subcontractor's main claim was that it relied on the CPM schedule contained in the specifications while preparing its bid, and that the schedule was not adhered to and instead the subcontractor was made to work out of sequence. The GC and surety both defended by pointing to a "no-damage-for-delay" provision in the subcontract. The subcontractor countered that adherence to the specified schedule in the bid package was a fundamental obligation of the parties' contract and the GC's failure to follow the specified schedule constituted a breach of a fundamental obligation sufficient to nullify the enforcement of the "no-damage-for-delay" clause.

The subcontractor was relying on the rule in New York that a no-damage-for-delay clause will not bar a contractor's delay damages arising from: (1) a party's bad faith or willful, malicious, or grossly negligent conduct, (2) delays that were not contemplated by the parties at the time they entered into the contract, (3) delays so unreasonable in length that they constitute an intentional abandonment of the project, and (4) a parity' breach of a fundamental obligation of the contract.

The court denied the subcontractor's claim and enforced the no-damage-for-delay clause. Initially, the court defined the pre-bid CPM schedule as a *sample.* It also found the subcontractor's argument that adherence to the sample schedule as a *fundamental obligation* of the subcontract to be lacking where it could not be reconciled with the subcontract's other provisions that expressly stated the schedule was subject to change and, specifically allowed for the scheduled work to be resequenced. The subcontract contained the following provision:

> The Subcontractor understands that the work of this trade may not be continuous and that he may be required to work out of sequence and/or leave a portion of work out due to coordination at the direction of the General Contractor. There shall be no charges for "comeback time" or out of sequence work."

The court found that plaintiff had notice that the schedule was subject to change and its delay claims were dismissed.

The case serves as a further reminder of the importance of contract review so the parties can assess and manage the risks they have assumed by the written terms of the agreement.

JUDGE BOOSTS AWARD TO BUILDER FROM $3 THOUSAND TO $128,000 IN SUIT OVER INCOMPLETE HOME

*EMCO Tech Construction Corp. v. Pilavas*

IN A NASSAU COUNTY SUPREME COURT ACTION—the judge multiplied his original award to a general contractor by 38. The case arises from a residential construction project in Nassau County New York. At the close of evidence the court awarded the GC just $3,413. The GC moved to reargue arguing that the court had mistaken in its computation of damages. The judge agreed and upped the award to $128,028!

The case centered around the question of substantial completion and the percentage of work complete. Upon review of his trial notes the judge agreed that he had arrived at a defectively low completion percentage by failing to include the completion of the carpentry portion of the construction. If it had not been corrected on reargument the owner would have gotten a windfall because he would have received the completed carpentry and also been credited with the cost to complete the carpentry.

For some reason the judge was not provided with trial transcripts by the parties as is typical and so had to rely solely on his handwritten trial notes.

**TRIABLE ISSUES OF FACT IF SUBCONTRACTOR PERFORMED SATISFACTORILY RAISED PRECLUDING SUMMARY JUDGMENT**

*Berto Construction Inc. v. Pergament Mall of Staten Island LLC, 101254/2006, Decided 07/22/08, Supreme Court, Justice McMahon*.

PLAINTIFF SUBCONTRACTOR sought to recover monies allegedly due and Owing from defendant NY Paving, for asphalt, paving work performed on defendant Mall's

property. Plaintiff contended It started work on the site, but stopped after payment from NY Paving ceased, to which it concedes same. The court noted while the contract was not alleged to have a "pay-when-paid" clause, plaintiff alleged NY Paving failed to perform under the contract as codefendant Mall failed to remit payment to NY Paving. The Court of Appeals ruled that "pay-when-paid" clauses were generally unenforceable as against public policy. The court found plaintiff made a prima facie showing of entitlement to summary judgment establishing NY Paving had yet to pay under the terms of the contract for work completed. However, NY Paving raised a triable issue of fact presenting admissible evidence of whether the Work performed by plaintiff was satisfactory, denying plaintiff's summary judgment motion.

**LIMITATION OF LIABILITY CLAUSE ENFORCED**

*R&J Construction Corp. v. E.W. Howell Co. Inc., 9300/06*

Defendant carpentry subcontractor moved for summary judgment to dismiss plaintiff general contractor's cause of action for consequential damages and lost profits for intentional bad faith termination. Defendant argued that the general contractor's claims had to be dismissed because the parties' contract, while allowing termination for convenience, barred recovery of consequential damages and lost profits. The general contractor argued the bar clause should not be enforced because of the allegedly intentional bad faith wrongful termination by the subcontractor. In certain instances, courts will set aside limitation of liability clauses, for example, in the case a contractor who demanded $6,000,000.00 to approve certain alterations. In that case, the agreement did not allow for such exorbitant sums. In the instant action, however, the court granted the defendant's summary judgment motion holding that the subcontractor's conduct was not so egregious as to warrant denial of the enforcement of the limitation of damages clause.

**POST VERDICT RULING IS LAW OF THE CASE**

*Metropolitan Steel Industries Inc. v. Perino Corp.*

Plaintiff steel contractor sued defendant prime contractor for contract balance and damages for extra work based upon 27 outstanding change orders. Defendant moved for partial summary judgment to dismiss, alleging that at least 11 of the 27 change order proposals were claims for delay claims, which were barred by a no damage for delay clause. Defendant's motion papers identified the 11 change orders alleged to be claims for delay damages. In opposition, the plaintiff argued that the parties' contract did not contain a no damage for delay clause and even if it did, it was unenforceable but, did not deny that the 11 change orders were for delay damages. The motion for partial summary judgment was granted but, the court's order did not specify which of the 27 change orders were for delay claims. Thereafter, the parties proceeded to trial before a different judge than who decided to partial summary judgment motion. The issue arose at trial as to which specific claims had been previously dismissed. At trial Defendant

challenged plaintiff's entry of evidence as to change orders X-22A and X-23 on the ground that these change orders had been dismissed. Defendant did not challenge entry of evidence as to a third change order X-32A. Before going to the jury the issue came up again. The trial judge let the case go to the jury and instructed the parties to resolve any ambiguity after verdict. The jury found for the plaintiff steel company. Defendant moved to set aside the verdict on the claims X-22A, X-23, and X-32A on the ground that they were previously dismissed. The trial judge denied the motion to set aside the verdict, but permitted the defendant to "seek clarification" from the judge who decided the summary judgment motion. In response to the motion for clarification, the court held that the three change orders were in fact dismissed. Thus, while the specific change orders were not specified in the initial order and even though defendant did not object to entry of evidence as to change order X-32A, the order clarifying the prior order became the law the case dismissing the claims.

## CONTRACTOR BOUND BY CONTRACT'S FORFEITURE CLAUSE

*FCI Group, Inc. v. City of New York*

Plaintiff FCI Group, Inc. ("FCI") sued the City of New York for breach of contract in the amount of $260,928.37, the alleged balance remaining unpaid on its contract with the City for general construction work at Brooklyn's Borough Hall. The court held that FCI forfeited its rights under the contract when its president, James Lee attempted to bribe two City employees responsible for approving payment to FCI.

The work was substantially complete on November 30, 2005. The following month, two city employees informed the Inspector General's office that they found envelopes with Christmas cards containing $3,000 each and a copy of FCI's August, 2005 change order request for $101,708.82 on their desks. Lee admitted to the payments and ultimately entered a guilty plea to attempted giving of unlawful gratuities. Thereafter, the City canceled FCI's contract as a result of Lee's misconduct pursuant to a forfeiture clause in the contract that provided for its termination in the event of illegal or unethical conduct on the part of the contractor.

In its action against the City, FCI contended that terminating its contract under the forfeiture clause was a violation of public policy. The court held that the illegal conduct at issue had a direct connection to the obligation sued upon since it concerned a significant portion of the outstanding balance remaining due on the contract. While the work had been substantially completed, payment for the outstanding balance had to be approved by the City employees Lee attempted to bribe, including the outstanding change order request for $101,708.82. A material amount of the contract consideration was at risk, and Lee's attempted bribe was intended to influence the employees' decision. Thus, the corruption was not merely incidental to FCI's performance under the contract and the City was within its rights to terminate the contract.

## US SUPREME COURT LIMITS APPELLATE REVIEW OF ARBITRATION AWARDS

*Hall Street Associates, LLC v. Mattel, Inc.* 552 U.S. ---, 128 S.Ct. 1396 (2008)

The United States Supreme Court recently resolved a dispute among the lower courts as to whether the parties to a contract containing an arbitration clause can agree in the contract to change the standards set forth in the Federal Arbitration Act (FAA) for vacating an arbitration award.

Under Section 9 of the FAA, the court must confirm an arbitration award unless vacated, modified, or corrected as provided in Sections 10 and 11 of the FAA. Under Section 10 of the FAA, a court may vacate an arbitration award only if the award was obtained by corruption, fraud, or undue means, or if the arbitrator was biased, engaged in misconduct, or exceeded the scope of his or her powers and authority under the arbitration agreement.

In *Hall Street Associates, LLC v. Mattel, Inc.* 552 U.S. ---, 128 S.Ct. 1396 (2008), the Supreme Court was asked to decide whether the parties to a contract containing an arbitration clause could authorize the court to vacate an arbitration award on appeal if the arbitrator's findings of fact are not supported by the evidence or if the arbitrator's conclusions of law are erroneous. The Supreme Court held that the FAA expresses Congressional intent to establish a "national policy favoring arbitration with just a limited review needed to maintain arbitration's essential virtue of resolving disputes straight away." Thus, under *Hall Street*, courts can no longer enforce arbitration agreements that provide extended grounds for vacating an arbitration award.

## COURT BACKS CONTRACTOR OVER CONTRACT DISPUTE

*Wallkill Medical Development, LLC v. Sweet Constructors, LLC*

In this case, the plaintiff Wallkill Medical Development, LLC ("Wallkill") entered into a written contract with the defendant Sweet Constructors, LLC ("Sweet Constructors") to provide only design services for the construction of a medical office building in Dutchess County, New York. The two parties never entered into a written contract for the construction of the project. Wallkill terminated Sweet Constructors due to its failure to obtain payment and performance bonding. Wallkill claimed that this was a breach of the parties' contract which forced Wallkill to rebid the contract and sustain damages resulting from delay. Additionally, Wallkill claimed that based on the parties' actions that they agreed to all of the terms of an unwritten comprehensive contract for the design and construction of the project. On the other hand, Sweet Constructors claimed that the parties intended to enter into a separate written contract for the construction of the project in addition to the written contract for the design on the project. Sweet Constructors claimed that since the parties never entered into a construction contract

and since the design contract did not have a bonding requirement, that their failure to obtain bonding was not a breach.
The Appellate Division, Second Department determined that the parties never entered into a construction contract because there was never any complete agreement on any essential contract terms such as dates for commencement and substantial completion of work, and the contract price. Additionally, the court found that the parties manifested a mutual intent not to be bound until the execution of a formal written construction contract. Based on these finding, the court held that no enforceable obligation or agreement existed for the construction of the project and dismissed Wallkill's third cause of action.

## FIRM HIT WITH $105K PENALTIES FOR ALTERED OSHA REPORT

*Secretary of Labor v. A. G. Mazzocchi, Inc.*

This action involved the OSHA Review Commission upholding three "Serious" and two "Willful" citation items, together with $105,000 in penalties against A. G. Mazzocchi, Inc. ("Mazzocchi") resulting from airborne lead exposure to employees. Mazzocchi, a demolition contractor had workers on a project for the demolition of a 350-ton crane at the Philadelphia Navy Yard. The Mazzocchi workers had spent about six months torch-cutting steel, which was covered in lead-based paint. Upon receiving reports that Mazzocchi workers had sustained high blood-lead levels ("BLL"), the Occupational Safety and Health Administration ("OHSA") commenced an inspection. As a result of the inspection, OSHA issued Mazzocchi a citation alleging serious, willful and "other than serious" violations of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, for failing to comply with various provisions of 29 C.F.R. § 1926.62, OSHA's lead in construction standard. The Secretary proposed a penalty of $105,000 for those items. Mazzocchi contested the citations, and after a hearing, Chief Administrative Law Judge Irving Sommer affirmed all but one of the lead in construction items, and assessed the total proposed penalty.

Mazzocchi had retained Omni-Med to take blood samples from employees on the project and a second company had been retained to perform the laboratory analysis. The BLL's for Mazzocchi's main torch-cutter, "John Doe" exceeded the "action level" of 30 ug/m3, which required him to be removed from tasks involving exposure.

OSHA investigators had asked Mazzocchi for copies of all biological monitoring reports for workers who had been on the project. Some were produced but not all, including "John Doe". Further investigation revealed that the general contractor and its environmental consultant had been thwarted in requests for BLL reports on Mazzocchi workers on the project. When "John Doe's" report was produced the BLL results were lower then the previous reports which showed higher BLLs.

A “Serious” citation was upheld when Mazzocchi had failed to provide and make available to “John Doe” at the required intervals prescribed the sampling and analysis for zinc protoporphyrin (“ZPP”) levels. Furthermore, the other “Serious” citations were upheld when Mazzocchi failed to provide “John Doe” with a compliant medical examination.

A “Willful” citation was affirmed when Mazzocchi failed to provide written notice to “John Doe” of his elevated BLL along with his right to temporary medical removal. The second “Willful” citation was affirmed when Mazzocchi violated 29 C.F.R. § 1926.62(n)(5), which requires the employer to make available all relevant records to affected employees and to OSHA, for inspection and copying when Mazzocchi failed to produce BLL reports on two occasions. The first occasion was when a request was made by the Compliance Officer and the second occasion was in response to a subpoena.
The commission affirmed these violations and found that Mazzocchi had altered “John Doe’s” BLL report, and lied about having done so, and had withheld records showing elevated BLLs from both the affected employee and OSHA representative.

Experience in providing legal services and advice on a wide variety of issues and matters arising in the construction industry. The firm represents owners, architect/engineers, construction managers, general contractors, material suppliers, specialty subcontractors, and surety and bonding companies with regard to projects in both the private and public sectors. The firm currently provides legal services for construction projects throughout the Northeastern states and internationally as required by the needs of our clients.

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