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

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VIOLATIONS OF STATUTORY REQUIREMENTS DO NOT GIVE RISE TO A BRACH OF CONTRACT ACTION

Skanska USA Bldg. Inc. Atlantic Yards B2 Owner, LLC 31 N.Y.3d 1004 (2018)

Skanska USA Bldg. Inc. contracted with Atlantic Yards B2 Owner, LLC to construct a building for B2 Owner for a price of approximately $116 million. Skanska USA informed B2 Owner that B2 Owner was required to post a bond under Lien Law §5, and that B2 Owner had failed to do so. As a result of that alleged failure, Skanska USA terminated the contract and sued B2 Owner for breach of that contract. B2 moved to dismiss the suit on the grounds that the requirements of Lien Law §5 were not terms of the contract.

Skanska USA argued that because the contract contained a clause saying that it would be governed by New York law, Lien Law §5 should be read into the contract. The Court of Appeals rejected this argument, holding that Skanska USA did not allege the breach of any specific term or section of the contract and therefore cannot maintain a lawsuit for breach of contract. Per the court, a choice of law provision is not enough to incorporate statutory requirements into a contract.

CONTRACT LIMITING CLAIMS AGAINST GENERAL CONTRACTOR ENFORCED AS WRITTEN, NOT REWRITTEN TO SUIT THE GENERAL CONTRACTOR.

Walsh Electrical Contracting, Inc. v. Aurora Contractors, Inc., Index No. 152521/2017

Aurora Contractors, Inc. was hired as general contractor to build a FedEx facility in Queens, NY. Walsh Electrical Contracting, Inc. was hired by Aurora to perform electrical work for the project. Walsh performed the required work. The general contract requires Walsh to give notice to Aurora of any claim for damages within 5 days of the claim accruing. Further the contract provides that any such claims "may be mediated by the parties." Walsh brought an action for Aurora's failure to pay.

Aurora moved to dismiss the action on the grounds that Walsh did not give notice, nor had submitted to mediation. Because, Aurora argued, Walsh did not meet either condition prior to bringing the action, the action was barred by the terms of the contract.

The court disagreed. The court noted that the contract only required notice for claims of damages, not claims for unpaid invoices. Further, the court noted that mediation was optional, not mandatory. The court explained that it would not rewrite the plain terms of the contract to suit the wishes of Aurora. Because neither condition applied to Walsh's claim, the court denied Aurora's motion to dismiss.

WHERE CONTRACT REQUIRES A PARTY TO PERFORM ALL REASONABLY NECESSARY ACTIONS, REASONABLENESS WILL NOT TO FRUSTRATE THE PURPOSE OF THE CONTRACT.

Grandfeld II, LLC v. Kohl's Department Stores, Inc. 2018 WL 3450312

Grandfeld leased certain land to Kohl's for the express purpose of Kohl's constructing a department store on the property. The lease contained various contingencies, the exercise of which allowed either party to cancel the lease without liability to the other party. Among those contingencies, Kohl's had the right to cancel the lease if it was unable to acquire all reasonably necessary government approvals for the

project within six months of obtaining zoning approval. Kohl's, some seven months after obtaining zoning approval, canceled the lease on the grounds that it had failed to obtain a New York Department of Transportation highway permit. Grandfeld sued for breach of contract.

Grandfeld argued that the DOT permit was not reasonably required within the meaning of the contract. According to Grandfeld, the DOT permit was only required nearly at the end of the construction process and could not be obtained before construction had begun. Kohl's argued that the DOT permit was required to be obtained before the construction could be completed and the contract was clear.

The court sided with Grandfeld, noting that the contract only allowed termination if the approvals were not reasonably necessary within six months. Because Grandfeld produced evidence the DOT permit could never have been obtained within sixth months in this project, it was not reasonably required. The court noted that Kohl's interpretation of the contract would make it impossible to complete, and the court was unwilling to interpret a contract in such a way as to frustrate its clearly intended purpose.

A CONTRACT WHICH SETS A ONE YEAR STATUTE OF LIMITATION FOR A SUBCONTRACTOR'S ACTION IS UNEFORCEABLE WHERE THE LIMITATION PERIOD BY CONTRACT BEGINS BEFORE THE ACTION COULD HAVE BEEN DISCOVERED

D&S Restoration, Inc. v. Wenger Construction Co., Inc. 160 A.D.3d 924 (2nd Dep't 2018)

Defendant Wenger Construction Co., Inc. contracted with the New York City School Construction Authority for a school construction project. Wenger subcontracted with Plaintiff D&S Restoration, Inc. to have D&S remove certain material from the project, including material thought to contain asbestos or PCB. The subcontract contained language which prohibited D&S from bringing action after one year had passed from substantial completion of the work.

Several years after substantial completion of the work, D&S brought suit against Wenger, alleging that Wenger had failed to pay the amount due to D&S. Wenger moved to dismiss, arguing that the action was time barred by the one year clause in the subcontract. In opposition, D&S argued that it could not have brought suit earlier; Wenger had refused payment on the grounds that it was waiting to be paid itself by the School Construction Authority before it paid D&S. As a result of the School Construction Authority's delay, Wenger was not obligated to pay D&S until more than a year after substantial completion of the work.

The court sided with D&S, ruling that the one year limitation was unreasonable. The court noted that parties are free to contract for time limitations of claims that differ from the New York statutes of limitation. However, the court found that D&S had no opportunity to bring its cause of action until after the limitation period had passed. While the one year period was not objectionable itself, the court held it was unreasonable to set the one year period to start at substantial completion, rather than when D&S could have or should have discovered Wenger's breach.

CONTRACTOR CANNOT CLAIM FRAUD AS TO THE TERMS OF A CONTRACT WHERE IT AND ITS ATTORNEY HAD THE OPPORTUNITY TO READ THAT CONTRACT

Prompt Mortgage Providers of North America, LLC, v. Zarour 155 A.D.3d 912 (2nd Dep't 2018)

Defendant Zarour executed a construction mortgage and note with Plaintiff Prompt Mortgage Providers for $650,000.00 in connection with a construction project in Rockland County. In a motion for summary judgment, Prompt Mortgage established that Zarour signed and executed the mortgage and the note, and then defaulted on the note. In opposition to the motion for summary judgement, Zarour argued that the mortgage and note were fraudulently induced.

Zarour argued that the Prompt Mortgage, at the closing, gave Zarour and his attorney the mortgage and note for the first time and instructed him to sign the documents without reviewing them. Zarour claimed that he signed the documents because Prompt Mortgage's representative was a friend whom Zarour referred to as "almost like a father figure."

The court sided with Prompt Mortgage. In rejecting Zarour's argument, the court noted that under New York law a party who signs a contract is presumed to have read it, and the terms of the mortgage and note are clear. The court ruled that Zarour had the opportunity to read the contract and to

have his attorney read the contract. As a result, Zarour cannot have justifiably relied on any misrepresentations he might claim Prompt Mortgage made to induce him to sign the mortgage and note. Without justifiably reliance, Zarour cannot claim that his signature of the mortgage and note was fraudulently induced.

A LIQUIDATION AGREEMENT REQUIRES A GENERAL CONTRACTOR TO TAKE ALL REASONABLE STEPS TO PROTECT A SUBCONTRACTORS INTERESTS AGAINST THE OWNER DURING A CONSTRUCTION PROJECT.

Rad and D'Aprile, Inc. v. Arnell Construction Corp. 159 A.D.3d 971 (2nd Dep't 2018)\

The New York City Department of Sanitation contracted with Defendant Arnell Construction Corp. to build sanitation garages in Brooklyn. As part of that contract, Arnell agreed that any claims arising from that contract would be brought within six months of the City's issue of a certificate of substantial completion for the project. Arnell subcontracted with Plaintiff Rad and D'Aprile, Inc. for masonry work for the project. Rad and Arnell executed a liquidating agreement, placing liability on Arnell for Rad's recovery against the owner, should the owner accrue liability to Rad over the course of the project. In 2007, the City issued a certificate of substantial completion for the project. In 2010, Arnell brought a claim, on its own behalf, and on behalf of Rad, against the City for damages and additional costs related to various delays. That claim was dismissed for being brought well after the six month limitation from the primary contract.

Rad brought an action against Arnell claiming that Arnell had breached its duty of good faith and fair dealing with respect to the liquidating agreement by failing to timely prosecute Arnell and Rad's claim against the City. Arnell moved to dismiss Rad's claims on the grounds that Rad's complaint was insufficient.

The court sided with Rad. The court ruled that Rad had adequately pled the existence of the liquidation agreement, as well as the facts surrounding Arnell's failed litigation against the City. Further, the court ruled that a covenant of good faith and fair dealing in the context of a liquidation agreement requires the general contractor to take all reasonable steps to protect the subcontractor's interest. The court ruled that Rad had sufficiently alleged that Arnell failed to take those reasonable steps to protect Rad.

A SUBCONTRACT THAT DOES NOT EXPLICITELY MENTION A GENERAL CONTRACT DOES NOT INCORPORATE THE TERMS OF THAT GENERAL CONTRACT

SJS Construction Company, Inc. v. Darius Masonry, Inc., 156 A.D.3d 933 (2nd Dep't 2017)

SJS Construction Company was hired as general contractor for a project on Long Island. As part of SJS's prime contract with the project owner, SJS agreed to arbitration of any dispute under the prime contract. SJS entered into a subcontract with Darius Masonry to perform certain masonry work for the project. Darius failed to perform any work on the project and SJS was forced to hire a second masonry subcontractor at a greater price. SJS sued Darius for the difference in price as damages for Darius's breach of the subcontract.

Darius moved to dismiss the complaint, arguing that SJS was bound to arbitrate the dispute under the terms of the prime contract, which Darius claimed was incorporated by reference into the subcontract. The court disagreed. First, the noted that Darius had not provided the court with the prime contract, making it impossible for the court to confirm its terms. Second, the court noted that the subcontract did not refer directly to the prime contract, but only indirectly. Without a direct reference to the arbitration provision, that provision of the prime contract would not apply to the subcontract.

OWNER CANNOT SUE A SUBCONTRACTOR FOR BREACH OF CONTRACT WITHOUT A CONTRACT OR SOME OTHER DIRECT CONTACT BETWEEN THE OWNER AND SUBCONTRACTOR

Stapleton v. Barrett Crane Design & Engineering 725 Fed.Appx.28 (2nd Cir. 2018)

Plaintiff Stapleton hired Pavilion Building Installation Systems as general contractor for a project to build structures for Stapleton's business. Pavilion hired Barrett Crane Design & Engineering and Zehn Burhan Uzman to provide engineering and architectural services respectively. After the completion of the project, Stapleton sued Pavilion,

Barrett and Uzman for producing a building that did not conform to the original contract. Uzman and Barrett moved to dismiss the charges against them on the grounds that they were not in privity with Stapleton.

Stapleton argued that she had the functional equivalent of privity with Uzman and Barrett. While she had no contract with Uzman and Barrett, Stapleton reasoned that Pavilion did, and their contracts with Pavilion were for her benefit.

However, the court ruled that no privity existed between Stapleton and Uzman and Barrett. The court acknowledged that under New York law, subcontractors can become liable to an owner for breach of contract if the subcontractor and the owner engage in direct dealings. However, Stapleton had no contact of any kind with Uzman or Barrett. Absent some significant direct action between parties, no functional equivalent of privity exists, and therefore, the court ruled, Stapleton could not sue Uzman and Barrett for breach of contract.

CONTRACTUAL PRECONDITIONS TO LAWSUIT DECLARED NO BAR TO CASE WHERE SUBSTANTIAL NOTICE WAS GIVEN.

Danco Electrical Contractors, Inc. v. Dormitory Authority of the State of New York, 2018 NY Slip. Op 03935

DASNY hired Danco Electrical Contractors to provide electrical contracting in regards to a project for the City University of New York at Brooklyn College. The contract provided various requirements with which Danco must comply before Danco could bring action against DASNY over a change order dispute. These requirements included various notice procedures as well as requiring Danco to send written notice to DASNY should it disagree with any denial of a change order DASNY issued. In the course of the project, Danco objected to various decisions DASNY made with respect to change orders. Danco did not follow the conditions of the contract exactly.

Danco brought suit against DASNY to collect damages for work it felt it performed without sufficient compensation due to DASNY's rejection of various change orders. DASNY moved to dismiss Danco's claims due to Danco's admitted failure to follow the exact terms of the contract. The court dismissed Danco's suit and Danco appealed. On appeal, Danco argued that while it had not followed the letter of the contract, it had given DASNY notice of its objections at multiple points, and DASNY itself claimed no prejudice due to Danco's failure to follow the exact terms of the contract. The appellate court agreed, ruling that Danco followed a procedure sufficiently close to the required procedure and that DASNY claimed no harm from Danco's technical failure.