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Davis-Bacon: Door Remains Closed to Suit by Workers for Wages in Federal Court

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A recent U.S. Court of Appeals decision confirmed that a worker has no private right of action against his contractor-employer for alleged failure to pay prevailing wages under the Davis-Bacon Act ("DBA") in a federal court action. In *Carrion v. Agfa Construction, Inc.*,[1] the court explicitly rejected an effort to permit such claims in federal lawsuits.

In 2008, New York's highest state court held that workers had the right to sue their employers under state law for unpaid wages based upon their status as beneficiaries under contracts for public construction, including contracts that fall under the DBA. The state court agreed with federal law that no *federal* private right of action exists in such cases but held that, under state law, state law claims were allowed. Some wondered if this meant that such claims could now be brought in federal court, signaling a change to current federal law.

In *Carrion*, the federal court answered this question with a definitive "no." The worker there

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Has Common Sense Finally Prevailed? The Court of Appeals Creates a New Three-Prong Test to Determine Applicability of Prevailing Rate on Public Projects

JOHN W. DRESTE

With little fanfare, the New York State Court of Appeals has unanimously decreed that a newly refined, three-prong test must be applied to determine whether a particular project is subject to prevailing wage requirements in New York State. In *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*[1], the Court established the new test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public.

For almost 30 years, the Court had applied a two-prong test requiring only that a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and that the contract must concern a public works project.[2] The new test keeps the first prong unchanged, but has refined the definition of "public works" by adopting the new prongs two and three.

The Court has recently focused on the first prong of the old test, twice holding that efforts by the New York State Department of Labor ("NYSDOL") to impose prevailing wage requirements on charter schools and certain volunteer fire departments did not satisfy the mandate that a public agency be a party to the applicable contract.[3] In both instances, the actual construction contracts at issue were entered into by private, not-for-profit entities, not by any public agency. The NYSDOL argued, however, that secondary agreements entered into between a not-for-profit entity and a public agency were sufficient to bridge that gap, and should qualify as the requisite contract involving the employment of laborers, workmen or mechanics. In the *M.G.M. Insulation* case, the NYSDOL went so far (and the Appellate Division, Third Department initially agreed) that courts should adopt a "functional equivalent" test under which certain entities (there a volunteer fire department) should be considered a municipal corporation within the meaning of the Labor Law, even though established as not-for-profit private entities. The Court of Appeals rejected both efforts by the NYSDOL to expand the first prong of the established test, but in neither case was the Court required to examine the second prong requirement that "public work" be involved.

De La Cruz provided the Court with the opportunity to thoroughly examine what constitutes public work under the meaning of the Labor Law and the State Constitution.

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CONTINUED "HAS COMMON SENSE FINALLY PREVAILED?"

One reason *De La Cruz* has somewhat flown under the radar is because neither the NYSDOL nor a contractor were parties. Rather the case concerned a direct action by employees of a dry dock and repair company who had performed work on city-owned vessels. The employees argued that the vessels qualified as "public works" and sued individually and on behalf of a class of approximately 750 fellow employees who repaired and maintained the city-owned vessels. The Court ultimately agreed with the employees, holding that the work on the city-owned vessels qualified as a public work subject to prevailing rate requirements. But, in doing so, the Court engaged in an exhaustive examination of what can qualify as a public work.

As a result, the Court created the second and third prongs of the new test, holding that the work must be "construction-like labor" in order to qualify, and that the project's primary objective must be to benefit the public.[4] But, the Court critically added within the new second prong the specific mandate that the project "is paid for by public funds." The Court reached that conclusion in large part through simple reliance upon definitions of "public works" within various dictionaries.[5] The Court observed that the two central aspects of the meaning of "public works" to be discerned from the dictionaries are that public works are works paid for by public funds and made for public use or other benefit.

The importance of the express requirement that public funds be involved cannot be overstated. This seemingly common sense observation is entirely new, with prior case law having held that the source of funding may be irrelevant. Most notably, in *Sarkisian Brothers, Inc. v. Hartnett*, the Appellate Division, Third Department ruled that an entirely privately financed hotel project, undeniably undertaken as a private venture for profit, could be wedged into the prevailing wage requirement if the NYSDOL was able to allege and demonstrate some public use, access and public enjoyment.[6] The Court has now definitively ruled that the absence of public funding for a project must be fatal to any effort to characterize a project as a public work subject to the prevailing rate requirements.

In recent years, the NYSDOL has targeted privately funded apartments adjacent to community colleges and even a privately owned and funded barbecue restaurant, because of arguable connections to public entities, either via a not-for-profit corporation's relationships or underlying public land ownership. One very gray area had been situations in which a public entity leased land to private developers that sought to privately fund, construct, and operate various types of projects. The newly minted mandate that public funds be involved creates a bright line test, removing much of the doubt previously inherent in such a project structure.

The scope of the 2007 so-called "Third Party Bill," that expanded the applicability of prevailing rate to projects carried out by private parties in the place of, on behalf of and for the benefit of defined public entities, should also now be more easily defined.[7] The fact that a lease, permit or other agreement exists between such a third party and a public entity may help satisfy prong one to the test, but public funding now must also be involved to satisfy the newly crafted second prong.

The new *De La Cruz* three prong test should permit greater certainty concerning whether or not the prevailing rate applies to given projects that are primarily of a private nature. In fact, this new, common sense test may allow for greater use in New York of public-private initiatives, because the mere involvement of a public entity should not necessarily eliminate the favorable lower cost structure that allows privately funded projects to succeed. It will be interesting to see how the NYSDOL responds. E&D

1 2013 WL 3213308 (2013), 2013 NY Slip Op. 04842. All Judges participating concurred, notably including Chief Judge Lippman. He issued dissenting opinions in both the *MGM Insulation* and *Charter School* decisions *(infra.)*. His concurrence in *De La Cruz* should help signal that the Court is firmly united with this outcome.

2 *Matter of New York Charter School Assn v. Smith*, 15 NY3d 403, 413 (2010), quoting *Erie County Industrial Development Agency*, 94 AD2d 532 (4th Dept 1983), *aff'd* 63 NY2d 810 (1984).

3 *See New York Charter School Assn v. Smith*, 15 NY3d 403 (2010), *Matter of M.G.M. Insulation, Inc. v. Gardner*, 20 NY3d 469 (2013).

4 Citing *Matthew of Twin State CCS Corp. v. Roberts*, 72 NY2d 897 (1988) and *Matter of 60 Market Street Assoc. v. Hartnett*, 153 AD2d 205 (3rd Dept 1990), *aff'd* 76 NY2d 993 (1990).

5 2013 WL 3213308 at p.6; *citing Black's Law Dictionary*, 1746 (9th Ed. 2009), *Websters New Twentieth Century Dictionary of the English Language Unabridged* 1368 (1st Ed. 1950), *Merriam-Webster's Collegiate Dictionary* 1006 (11Ed. 2003) and *The Oxford English Dictionary Third Edition*, http://www.oed.com.

6 172 AD2d 895 (3rd Dept 1991), *mot for leave to app denied*, 78 NY2d 859 (1991).

7 §220 (2) New York Labor Law, 2007 amendments.

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argued that a prior federal holding[2] which precluded his claim was no longer valid or should be overruled in light of the New York cases. Instead, the court reaffirmed the validity of the earlier case and its determination that the DBA does not confer a private right of action on an aggrieved employee for back wages, and that state-law actions seeking to achieve the same goal were not permissible. The federal court found the New York state court cases permitting such actions unpersuasive and not controlling in federal court. The court said the "differing view of the preemptive scope of federal law" held by the New York court did not impact its ruling in denying the *Carrion* claims.

This apparent conflict could be significant for both potential wage claimants and contractors on projects subject to the DBA. The issue of a direct right of recovery against the contractor may hinge on whether the action is brought in state or federal court. So, while contractors must continue to be concerned about state wage claims, at least for now, the door to the federal courthouse remains closed. E&D

1 2013 WL 2631348 (C.A. 2 N.Y. Jun. 13, 2013)

2 *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir.2003)

Buyer Beware: Doctrine of Caveat Emptor Still Alive in New York

THOMAS K. O'GARA

With the real estate market starting its recovery, contractors looking to buy and sell homes must be aware of the doctrine of caveat emptor, which is still alive and well in New York. In a recent case, successfully defended by Ernstrom & Dreste, a buyer's lawsuit against a seller-contractor for alleged defects in the house was dismissed years after the closing occurred based, in part, upon this doctrine.

In the case, the seller bought and renovated a house in the Capital Region, then sold the house to buyer in 2010. In 2013, the buyer alleged that there were water infiltration issues and an HVAC problem with the home. The buyer commenced an action against seller seeking approximately $300,000 in damages.

The buyer first alleged that the seller breached the terms of the real estate contract by failing to convey the property "free from any material, latent defects." This claim was dismissed under the merger doctrine, which states that the terms of a real estate sales contract are merged into the deed upon closing, absent the parties' intent that the provision should survive transfer of title. Because all provisions in the sales contract were merged into the deed at closing, and there was no allegation that the parties intended for any provisions to survive closing, the claim for breach of contract was dismissed.

The buyer also asserted a cause of action for fraud, alleging that the seller misrepresented that the house had no material defects. The fraud claim was dismissed for multiple reasons. First, allegations supporting a claim for fraud must be detailed, specifically stating the misrepresentations made and that the seller knew the representations were false at the time. No such facts or details were supplied. The fraud claim was also dismissed because, in the real estate contract, the buyer stated that he was not relying on any promises made by the seller. Claims for fraud require a justifiable reliance by the buyer. Since the buyer admitted that he did not rely on any alleged promise, there could be no cause of action for fraud.

Finally, the fraud cause of action was dismissed because of the doctrine of caveat emptor. Under this doctrine, a seller is only liable for failing to disclose information if the conduct constitutes active concealment, i.e. that the seller thwarted the buyer's responsibility to inspect the house [and otherwise comply with caveat emptor]. Here, there were no allegations of active concealment.

Generally, a seller will not be liable to the buyer after closing for any defects with the house. This rule, of course, has exceptions. The seller is required by law to make certain specified disclosures, the seller cannot actively conceal defects, the transaction must be at "arm's length," and the seller must disclose any known defects that the buyer would not detect upon a reasonable investigation. Providing a warranty is an additional way for a seller to remain liable for the sale of real estate after title has passed. Except in these limited circumstances, however, the buyer assumes the risk of the bargain. E&D

Construction Manager Held Not Responsible for the Safety of Workers at a Construction Site

TIMOTHY D. BOLDT

Construction managers risk liability for personal injuries on a construction site in two primary situations. The first is where the construction manager has been delegated the authority and duties of a general contractor.[1] The second is where the construction manager acts as an agent of the property owner.[2]

In a recent case decided by one of New York's Appellate Divisions[3], the appellate court overturned a trial court's refusal to dismiss a personal injury lawsuit brought against a construction manager, despite evidence that the construction manager was not acting as a general contractor and that it had not been acting as an agent for the owner of the premises. Whether a construction manager has been delegated the authority and duties of a general contractor is typically a straight forward analysis, resolved by whether the construction manager is self-performing work. The agency issue is not as simple to resolve, although good contracts and good risk management practices help reduce unintended consequences. Under New York law, a construction manager is deemed to be an agent for the owner (within the personal injury context) when it has supervisory control and authority over the work being performed on the project where the accident occurred.[4]

According to the Appellate Division, where a construction manager can demonstrate, through documentation and testimony, that it did not have supervisory control and authority over the work being performed, the construction manager should be released from the lawsuit on summary judgment and should not be forced to present its case at trial. E&D

1 *Rodriguez v. JMB Architecture, LLC*, 82 A.D.3d 949 (2d Dept 2011).

2 *Id.*

3 *McLaren v. Turner Constr. Co.*, 105 A.D.3d. 1016 (2d Dept 2013).

4 *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311 (1981).

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FIRM NEWS

Braggins and Peartree join list of Super Lawyers; Boldt and O'Gara Rising Stars

Ernstrom & Dreste, LLP is pleased to announce Todd Braggins, managing partner, and Kevin Peartree, partner, have both been named 2013 New York Super Lawyers. Mr. Braggins and Mr. Peartree join in this achievement with fellow partners John Dreste and Martha Connolly who are already recognized as Super Lawyers. Timothy Boldt, also a partner with the firm, and associate Thomas O'Gara, have both been named 2013 New York Super Lawyers Rising Stars.