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ContrACT

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## Scaffold Law Case Round Up

NELL M. HURLEY

The courts continue to rule on numerous cases involving the so-called "Scaffold Law" provisions that hold certain parties strictly liable under New York Labor Law's safety provisions. Some recent cases are highlighted here:

**Balzano v. BTM Dev. Partners**[1]

The plaintiff was injured when he fell from a scissor lift, a covered activity under the Scaffold Law. His employer was a subcontractor to a contractor that had a direct contract with the owner/tenant, retailer Target Corporation for certain work. However, Target's overall general contractor for the build-out of the retail store, Plaza Corporation claimed that it bore no responsibility for the plaintiff's injuries because the work he was performing when injured was specifically "carved-out" of Plaza's contract with Target. Plaza had no contractual supervisory responsibility for plaintiff's work, Plaza argued, and was entitled to summary judgment of no liability.

The court found, however, that there were contract provisions in the Target-Plaza contract under the article addressing "PROTECTION OF PERSONS AND PROPERTY" that supported a finding that Plaza had supervisory control over plaintiff's work. In addition, testimony of a Target representative suggested that

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## Difficulties with Delay Damage Claims

TIMOTHY BOLDT

The business of construction is not for the faint of heart or the risk adverse. Success in the industry often necessitates the technical knowledge and practical experience of a learned tradesman, the organizational habits of an exceptional administrator, the savviness of a career politician, and a poker player's willingness to accept risk. Add to that list: the analytical skills of a pessimistic lawyer.

During the golden age of construction, a contractor could reasonably expect to be compensated for delay impacts, both in the form of additional time and additional money. Even over the past few decades, with the rise in popularity of so-called "no damage for delay" provisions, contractors often found themselves able to obtain equitable compensation based on reasonable, although not necessarily strict, compliance with contract claim provisions.

A growing body of New York case law and a clear shift in contract language being adopted by owners strongly suggest that they are trying to make financial compensation for delay claims a thing of the past.

In a June, 2016 appellate decision[1] arising out of a Syracuse trial court, a public owner obtained dismissal of a contractor's delay/impact claim. The contractor had alleged that the owner disrupted its work by forcing it to perform work out of sequence, by failing to reasonably coordinate, and by failing to provide adequate design documents.

The court recognized that the owner's conduct amounted to "inept administration and poor planning", but nonetheless, resolved the lawsuit in the owner's favor without ever addressing the merits of the claim. It simply pointed to a "no damage for delay" provision in the contract, and stated that its existence meant that the contractor knew it would not be compensated for such delay impacts. The court rejected efforts to characterize the impacts as arising from "disruption" instead of delay.

A month earlier, in May 2016, in a case arising out of Queens County, another delay claim was dismissed on appeal, this time with a focus on strict compliance with claim provisions.[2] The evidence showed that the owner had actual knowledge of the delays and of the claims. However, the court found that the contractor did not provide verified statements of the amount of delay damages, or documentary evidence supporting the claim, within thirty (30) days after the claim was first presented, as required by the contract.

Based on a failure to strictly comply with notice provisions, the appellate court overturned a trial court's award of more than $200,000.00 in delay damages. The appellate court held that "express conditions precedent must be literally performed; substantial performance will not suffice, and failure to strictly comply with such provisions generally constitutes a waiver of a claim."

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Of all the recent decisions arising out of the delay claims, contractors may be most alarmed by one arising out of the Hudson Valley involving the Town of Patterson.[3] There, eight months after the contractor was declared the lowest responsible bidder, the project had yet to proceed. The owner gave the contractor the option to withdraw its bid, but then held a meeting to discuss options. At the meeting, in contemplation of withdrawing its bid, the contractor asked the town supervisor whether it would be compensated for increased costs of labor and material resulting from the delayed start. The court did not note the town's verbal response to the question but found that two days after the meeting, the town supervisor sent correspondence stating that "there appears to be no prohibition regarding application of contingency monies built into contracts toward potential increases in costs of material and labor due to extended time factor."

The contractor, thus believing that it would be compensated for increased labor and material costs, signed the contract and completed the project. According to the contractor, it was then verbally directed to present an invoice for the extra costs. Once submitted, however, the claim was denied.

In rendering a harsh result against the contractor, the court explained that exceptional circumstances need to exist in order for a municipality to be compelled to honor a verbal commitment by one of its agents, and further held that the contractor did not have the right to rely on verbal commitments of the town supervisor because the verbal commitments were directly contrary to explicit terms of the contract.

A review of updated contract terms being used by public owners also suggests a clear trend by owners to avoid liability for delay claims. For instance, the following is an excerpt from a 2010 contract used by a public owner in upstate New York: "[the contract] does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents."

In 2016, on the heels of settling a large delay claim arising out of allegations of interference, disruption and design defects, the same owner adopted the following language for a new project being let to bid:

> 1) The Contractor agrees to make no claim against the Owner or its Designated Agents ...for costs or damage resulting from delay or interference in the performance of the Contract; and 2) the Contractor expressly waives any rights it may now or hereafter have to recover costs or damages from the Owner or its Designated Agents, for any delay or interference in the performance of the Contract.

One can surmise that the lesson learned by the public owner was not how to conduct itself better on future projects, rather, that the inclusion of a "no damage for delay" provision will help it avoid liability for future delay claims.

Despite the recent pattern in case law, and the increasing trend toward inclusion of "no damage for delay" provisions, there are still ways to pursue delay claims in the face of contracts containing one. Such a provision does not bar recovery where: (1) the delays are caused by the bad faith or willful, malicious, or grossly negligent conduct; (2) the delays at issue could not have been contemplated; (3) the delays are so unreasonable that they constitute an intentional abandonment of the contract; and (4) the delays result from a breach of a fundamental obligation of the contract.[4]

To put your company in the best position to succeed, factor in "no damage for delay" provisions into the bid analysis, strictly comply with all notice and claim provisions and involve legal counsel at the first sign of an impact. F&D

1 Weydman Elec., Inc. v. Joint Schools Constr. Board, 140 A.D.3d 1605 (4th Dept 2016).

2 Schindler Elevator Corp. v. Tully Constr. Co., 139 A.D.3d 930 (2nd Dept 2016).

3 Laws Constr. Corp. v. Tn. of Patterson, 135 A.D.3d 830 (2nd Dept 2016)

4 Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 309–310 (1986).

CONTINUED "SCAFFOLD LAW CASE ROUND UP"

Plaza exercised actual supervisory control over the entire premises. The court said the fact that Target retained the right to, and did, enter into separate agreements for work not performed by Plaza does not eliminate issues of fact as to whether Plaza exercised supervisory control over the worksite or whether Plaza was charged with the legal duty to furnish a safe place to work for employees of all contractors. Plaza's motion was denied.

**Nazario v. 222 Broadway, LLC**[2]

While standing on a ladder, the injured plaintiff was performing electrical work when he received an electric shock from an exposed wire. He fell to the floor, still holding onto the ladder which remained in an open, locked position. The court modified the lower court's ruling and granted summary judgment to the plaintiff.

The court rejected the defendants' argument that the Scaffold Law requires that the ladder be shown by plaintiff to be defective which, concededly, this ladder was not. Rather, the plaintiff must show that the absence of adequate safety devices, or the inadequacy of the safety devices provided, was a proximate cause of his injuries, said the court. Under this reasoning, the court found it was sufficient that the plaintiff showed that he was injured when he was jolted by

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# Prompt Payment Act on a Collision Course with the Constitution

KEVIN F. PEARTREE

Too many contractors remain unaware of the full effect of New York's Prompt Payment Act[1]. Passed into law in 2003 and given teeth by amendments in 2009, what began as a default statute, filling in where parties failed to establish their own contract terms, now mandates payment terms and remedies for private construction contracts. There are other statutes specifying payment timeframes on public construction projects[2], but they lack the sharper teeth of the Act, curiously so given that many view public owners as the worst offenders when it comes to timely payment.

Among the Act's requirements, owners and contractors must approve or disapprove an invoice within 12 business days of receipt and provide a written statement of what has been disapproved. The Act limits what can be withheld from payment; limits that cannot be varied by contract.[3]

As for the timing of payment, owners must pay interim or final invoices no later than 30 days after approval, while contractors must pay subcontractors and suppliers within seven days after receipt of funds from the owner. If not, amounts due are subject to interest at 1% per month or a higher rate consistent with the contract. Contractors and subcontractors can stop work after at least ten days written notice demanding cure by payment.[4]

Perhaps most under-appreciated is the Act's expedited arbitration requirement. If the parties themselves cannot resolve a payment dispute, "the aggrieved party" – that is the one not getting paid – can refer the matter for expedited arbitration pursuant to the Rules of the American Arbitration Association. The arbitrator's decision can only be challenged on limited grounds: corruption, fraud, misconduct, partiality of the arbitrator, an arbitrator exceeding his power or failing to follow the procedures of Article 75 of the New York Civil Practice Law and Rules.

But what if the parties have already agreed upon dispute resolution procedures in their contract, choosing litigation? The Appellate Division, Third Department has provided its answer to that question. *In re Arbitration between Capital Siding & Construction, LLC*[5], addressed a contractor's efforts to stay arbitration on the grounds that the subcontract expressly provided that litigation was the parties' chosen method of dispute resolution. When a dispute arose and the contractor withheld payment, the subcontractor sought expedited arbitration as provided for by the Act. The subcontractor argued, and both the lower and appellate courts agreed, that the Act rendered the subcontract dispute resolution provisions void and unenforceable because they denied the subcontractor the option to arbitrate the payment dispute.

The Act renders void any contract provision "stating that expedited arbitration as expressly provided for and in the manner established by section seven hundred fifty-six-b of this article is unavailable to one or both parties."[6] The contractor in *Capital Siding* argued the supremacy of General Business Law §756-a, which states in part: "Except as otherwise provided in this article, the terms and conditions of a construction contract shall supersede the provisions of this article and govern the conduct of the parties thereto." That language, the courts in *Capital Siding* concluded, did not overcome General Business Law §753 (3).

Left unanswered by the court in *Capital Siding* is whether the Act's expedited arbitration mandate is trumped by a party's constitutional right to a jury trial. The contractor in *Capital Siding* raised that argument for the first time on appeal, and therefore the argument was not properly before the appellate court. Further, a constitutional challenge would require notice to the Attorney General.

But surely that argument is coming soon. This is not the first time the constitutionality of the Act has been questioned. The issue has long been on the horizon, with commentators questioning whether compelling parties to participate in arbitration and forego a jury trial in a court of law violates both the Federal and State Constitutions. When that issue is finally and properly raised, we will see what remains of mandated, expedited arbitration. E&D

1 New York General Business Law Article 35-E.

2 New York General Municipal Law §106-b(2) and State Finance Law §139-f.

3 New York General Business Law §756-a.

4 New York General Business Law §756-b.

5 138 A.D.3d 1265 (3rd Dept 2016).

6 New York General Business Law §757 (3).

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an electrical charge while he hung onto a ladder, because the ladder itself was not secured to something stable.

**Vitale v. Astoria Energy II, LLC**[3]

A surveyor was injured as he walked from anchor bolt to anchor bolt across the top of a rebar grid which was 100 feet by 50 feet and 5 feet high. The rebar grid had square openings of about 12 inches by 12 inches. The surveyor lost his balance while walking across the top of the grid and his leg fell through one of the square openings, up to his groin, injuring him.

The appellate court affirmed the lower court's dismissal of the surveyor's claim finding that the activity did not present an "elevation-related hazard" requiring protective devices as enumerated in the Scaffold Law. Since the openings of the grid would not have permitted the plaintiff's body to completely fall through and land on the floor below, the Scaffold Laws did not apply, said the court. Likewise, the court held there was no Industrial Code violation under the Scaffold Law: the grid openings were not "hazardous openings" because they were too small for the worker's body to completely fall through. E&D

1 137 A.D.3d (1st Dept 2016).

2 135 A.D.3d (1st Dept 2016).

3 138 A.D.3d 213 (2nd Dept 2016).

**NEW YORK**
180 Canal View Boulevard
Suite 600
Rochester, New York 14623

Visit us online at:
WWW.ERNSTROMDRESTE.COM

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## FIRM NEWS

Kevin Peartree will be speaking at the Associated General Contractors of America BuildCon in Atlanta on October 18th, on the topic "Which Standard Form Design-Build Contract is Right for You and Your Project". He will be presenting on this same topic at the Design-Build Institute of America Conference in Las Vegas on November 3rd and at the 2016 Construction Super Conference in Las Vegas on December 6th.

Thomas K. O'Gara will be presenting at the National Bond Claims Association Annual Meeting in Hilton Head, South Carolina this fall on the topic of "Dealing with the Difficult Owner."