CONSTRUCTION RISK MANAGEMENT REPORTER

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ContrACT

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It's Good to Be King

There is Always Time to Sue

TIMOTHY D. BOLDT

If you are considering a contract with the state of Connecticut (or just about any other state), stop before you sign, and make sure you understand the meaning of *"Nullum tempus occurrit regi,"* an ancient common law rule which means *no time runs against the king.* In *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412 (2012), the highest court in Connecticut ruled that the State can officially take 'as long as it darn well pleases' to start a lawsuit against any private party that provides goods or services to the State. Although contractors are bound by State laws that limit the time for starting a lawsuit against the State of Connecticut, the State, on the other hand, is no more bound by such rules, than a medieval English king would have been.

Although the *Lombardo Bros.* decision does not have any immediate impact on contractors entering into agreements with the state of New York, the case is unsettling because it appears that *nullum tempus* has not been abolished by the New York State legislature. As such, it remains to be seen whether New York will follow *Lombardo Bros.* to try avoiding the limitations periods that bind private parties.

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Caution – You Are About to Sign a Release

KEVIN F. PEARTREE

What are you signing away each time you execute a release in order to get paid? Two recent New York court decisions illustrate the perils of not understanding what you sign. If you execute a release with each progress payment, if you fail to document extra work, and if you accept final payment in the end, what is a court to do with your later filed lien for extra work and additional compensation? A subcontractor did not like the answer to that question given by the Supreme Court, Kings County, in the case of *Bey's Specialty, Inc. v. Euro Construction Services, Inc.*, 39 Misc3d 1205(A)(2013).

Euro Construction was a subcontractor to Bey's Specialty on a project for the New York City Housing Authority. Euro's subcontract with Bey's required that before each progress payment could be made Euro had to submit a certified affidavit of payment and waiver of lien for the Work performed and materials furnished through the date covered by the last preceding partial payment. Euro executed nine releases in total, each identically worded, except for the amount of consideration and the date of execution.

Euro's progress payments were based on estimates of quantities, subject to later adjustment as determined by the project construction manager. The construction manager determined that the quantities stated in the partial payment estimates were overstated and that Euro had been overpaid by more than $1.1 million. When Bey's request to Euro for reimbursement was refused, the general contract commenced an action seeking not only that amount but alleging that it had paid additional sums directly to Euro's own subcontractors, when Euro failed to do so. Only after Bey's had commenced this action did Euro then file a Notice of Mechanic's Lien in an amount in excess of $1.5 million. The lien was filed many months after Euro's last day of work on the project and after it had executed a release for all work performed through that date. Euro contended the lien was for extra work verbally directed by Bey's. Bey's challenged the validity of the lien contending Euro knowingly and intentionally signed and submitted releases without any reservations or exclusions that would have given Bey's any notice of an open claim and that Bey's paid Euro in reliance upon these releases.

The court in *Bey's Specialty*, was presented on one side with the language of nine releases, each governed by the principles of contract law, and on the other with allegations of verbal directions for extra work. To the court, the language of the releases was unambiguous and fully enforceable. The court took particular note of the language of the final release, executed by Euro on December 29, 2011 and covering the period ending December 25, 2011, releasing any and all claims for payments due for *any and all work* done by it prior to that date. Euro performed no work relating to the project after December 29, 2011.

As for the assertion that Euro had been verbally directed to perform extra work, the court took a hard line. Euro's vague contentions were not enough to compel the court to

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look beyond the four corners of the unambiguous releases. Presumably, these vague contentions were not bolstered by a lien filed months after the last work performed and in response to a claim of overpayment for overestimated quantities.

Only a few weeks after the *Bey's Specialty* decision, the Appellate Division, Fourth Department affirmed a holding in favor of a contractor awarding it damages for work performed despite having executed a final waiver and affidavit purporting that no further payments were owed. The decision in *Leonard E. Riedl Construction, Inc. v. Homeyer*, 105 AD3d 1391 (2013), N.Y. Slip Op. 02897, hinged upon evidence at a nonjury trial that the parties' course of dealings and the circumstances surrounding the release demonstrated the parties did not intend, nor did they treat the waiver, as a final and complete waiver of any further claims. Even after the waiver in question was executed, the parties made a verbal agreement to make payment for the completion of additional work, which work was performed and payments made.

Is the difference between these two cases just a matter of compelling evidence of extra work versus vague contentions? Perhaps. The court in *Bey's Specialty* might have reached a different conclusion if presented with the kind of evidence considered in *Riedl*. But while the *Riedl* decision appears correct on the merits, it could become a trap for the unwary, especially when the extra work in question was performed before the date of the executed release.

To the extent the contract documents include certain specified forms for payment applications and waivers, the time to review and seek modification of objectionable waiver language is before the contract is signed. If a party believes it has a claim, whether for extra work, delays, or differing site conditions to name a few examples, it must be noted and excepted from any release or waiver and expressly preserved. If not, a contractor risks waiving its claim on the basis of clear and unambiguous release language.

Before you sign any waiver, whether in a payment application form, lien release or change order, ask the following questions:

1. Have I read the waiver?
2. Do I understand every single sentence in the waiver?
3. Have I done any work outside the scope of my contract?
4. Do I have a fully-executed change order for that outside-the-scope work?
5. Does the waiver specifically state that I am preserving a claim for disputed extras?
6. Have I written into the waiver all of the claims that I want to preserve? E&D

CONTINUED "IT'S GOOD TO BE KING"

The obvious impact of *Lombardo Bros.* is that contractors may be exposed to limitless time-frames for potential liability on contracts with the State of Connecticut, and possibly other states as well. As a result, contracting parties might consider whether internal policies should be established to protect against the effects of long-delayed litigation, through insurance or other means. New York contractors, and the organizations that protect their interests, should address this issue with the legislature, and seek a bill abolishing *nullum tempus*. E&D

Subcontractor Must Tie Damages to the Alleged Delay

MATTHEW BROWN

When making a delay claim you must tie damages to the delay. Merely estimating or asserting a delay figure is not enough. In the unreported case *Mascorp, Inc. v. United States Fidelity and Guarantee Company*, Supreme Court Tompkins County, Index No. 2004-0164, (Justice Rumsey, 2013), the Court dismissed delay damage claims because plaintiff did not tie its alleged delay damages to anything specific.

Mascorp sued on a payment bond for delay damages on a project that comprised two phases. The Court dismissed delay damage claims for the first phase because Mascorp executed valid lien waivers and releases through the end of that phase.

The Court dismissed delay damage claims for the second phase because Mascorp could not substantiate that it sustained any delay damages. The Court held:

> As proof of damages, plaintiff relies on [an expert report]... The Report extensively summarizes the reasons for the delay...but limits its discussion of how damages were estimated to a single page, consisting primarily of a chart listing various categories of claimed additional expenses and the associated costs totaling $139,875.45.... Notably, there is no discussion of how the estimates were derived. For example, the chart claims that plaintiff incurred $102,334.54 in additional direct labor costs without explaining how that cost was determined, e.g., there is no itemization of the number of hours of additional labor required or the hourly cost for such labor.

The Court also explained that without "specific information showing the critical connection between actual costs incurred by plaintiff and the claimed damages, [the expert report] is only a subjective and speculative estimate that does not constitute adequate proof of damages." In a footnote, the Court stated that Plaintiff's claim for delays in the first phase of the project was likewise inadequate. The takeaway is that having an expert assert a delay damage figure is insufficient. The expert must explain how he calculated that figure and tie that figure to delays. E&D

Prevailing Wage: Volunteer Fire Department Not a Public Agency, So Rates Did Not Apply, But Holding Limited

NELL M. HURLEY

New York's highest court held that a construction contract with a volunteer fire department to build a new firehouse was not subject to prevailing wage rates under the state's Labor Law in the recent decision *M.G.M. Insulation, Inc. v. Gardner*, 2013 WL 598048 (N.Y.). The court based its decision on statutory language requiring that a public agency be a party to the contract for the work, and found that the volunteer fire department that contracted for the project, failed to meet that standard. It explicitly rejected the intermediate appellate court's decision upholding the Department of Labor ("DOL") determination that the volunteer fire department was deemed a municipal corporation based upon the so-called "functional equivalent" standard.

M.G.M Insulation arose out of a 2006 contract between the Bath Volunteer Fire Department ("Fire Department") and contractor R-J Taylor General Contractor, Inc. ("Taylor") to construct a new firehouse in the Village of Bath, New York ("Village"). The Fire Department was a not-for-profit corporation. An opinion letter from the DOL soon followed, stating that the project was a public work subject to prevailing wage laws, and an administrative hearing was held on the question of the applicability of those laws to the project.

The DOL Hearing Officer determined that the project was subject to the prevailing wage based upon his conclusion that volunteer fire corporations are the "functional equivalent[s]" of municipal corporations and that, because the Village authorized and supported the project, which entailed provisions of fire protection services to the community, it was also a "public work" under the statute. The intermediate appellate court agreed with the Hearing Officer.

The Court of Appeals reversed, holding that because no public agency was a party to the contract, as contemplated by the statute, the prevailing wage laws did not apply. In light of that, the Court did not reach the question of whether the project qualified as a public work. The Court dismissed the use by the Hearing Officer of the "functional equivalent" test, citing its 2010 rejection of the test in *Matter of New York Charter School Assn. v. Smith*[1]. There, the court ruled that a charter school, though "quasi-public" in nature, was not one of the public entities specified by statute, and thus the prevailing wage did not apply.

Significantly, however, the court recognized that in 2007 the statute was amended to expand its coverage to include "third party" contracts involving other types of entities when it can be shown they were acting on behalf of a statutorily-enumerated public entity. This revision means that if the contracting party is acting on behalf of the state, a public benefit corporation (such as an industrial development agency), a municipal corporation or a commission appointed by law, the prevailing wage applies. Because the contract between the Fire Department and Taylor occurred prior to the amendment, the statute as amended, did not apply.

Thus, although the *M.G.M. Insulation* ruled that the Fire Department's project was not subject to the prevailing wage laws, the holding has only limited application. The 2007 amendment closes what the dissent called the "loophole" whereby a private entity can contract for construction "on behalf of" one of those enumerated in the statute.

It appears that the prevailing wage laws will likely continue to be implemented expansively, so as to include agreements involving, even remotely, public payment for construction. Though an onerous task, a wise contractor must thoroughly investigate the financial arrangements for its construction projects to clarify whether any public money will be used before contracting, so as not to be surprised later when the DOL gets involved. E&D

1 15 NY3d 403 (2010).

Lien Discharge Bond Does Not Preclude Enforcement of Article 3-A Rights

MATTHEW BROWN

A contractor can bring an Article 3-A trust action and an action to foreclose a lien even after the lien was discharged by bond or deposit of funds. In *Professional Drywall of OC, Inc. v. Rivergate Development, LLC*, 952 NYS2d 852 (3d Dept 2012), a subcontractor sued the general contractor and project owner, seeking foreclosure of its mechanic's lien and an order compelling defendants to produce an accounting of assets of the statutory trust, which was created out of construction payments to assure payment of subcontractors, and to force defendants to repay funds allegedly diverted from the trust. In the Supreme Court, the defendants moved for summary judgment arguing that, because they deposited enough funds with the County Clerk to cover the lien, the Plaintiff no longer had any claims under the statutory trust. The Supreme Court, Ulster County, granted the motion, and the plaintiff appealed.

On appeal, the Third Department, Appellate Division held that the subcontractor could simultaneously maintain a lawsuit to foreclose its mechanic's lien, and to compel defendants to produce an accounting of assets of statutory trust and to repay funds allegedly diverted from trust, despite defendants depositing sufficient funds with the county clerk to discharge the lien. The Court reached this determination because the discharge of the lien was not equivalent to payment or discharge of the subcontractor's trust claim, and because defendants were obligated to fulfill their fiduciary duties regarding the trust until the merits of all subcontractors' claims were determined and any amounts owed were paid. E&D

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Ernstrom & Dreste also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Clara Onderdonk at conderdonk@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity and Surety Reporter can also be obtained at Ernstrom & Dreste's website (ernstromdreste.com).

FIRM NEWS

On June 11, 2013, John Dreste and Timothy Boldt will conduct a National Business Institute seminar entitled "Construction Defect Litigation: From A to Z".

Kevin Peartree and Thomas O'Gara recently served as instructors for an AGC of NYS session of the AGC of America Building Information Modeling Education Program, Unit 3 – BIM Contract Negotiation and Risk Allocation.

On May 8, 2013, Kevin Peartree, Martha Connolly and Timothy Boldt presented to the AGC of NYS Future Construction Leaders on the topic of Controlling Risk in Construction and Project Delivery Systems .