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CONTINUED "THE LOW DOWN ON FLOW DOWN"

In New York, the general rule is that a general incorporation by reference will incorporate only those provisions of the prime contract relating to the scope, quality or manner of performance of the work. Provisions in the prime contract addressing dispute resolution, payment, indemnification, no-damage-for-delay, for example, will not be incorporated into the Subcontract unless specifically referenced. This means that without more, a subcontractor may not be obligated to or limited by a no-damage-for-delay clause found in the prime contract that limits the prime's ability to recover against the owner damages for delays. Breakdowns in risk transfer such as this can have serious ramifications for the prime contractor.

The incorporation by reference and flow down effected by ConsensusDocs 750 has not been specifically interpreted by New York courts, but may be viewed as general in nature. Though it does define the Subcontract Documents to include the "prime agreement, special conditions, general conditions …", §3.1 references only the "terms of the prime agreement". While an argument may be made for an effective incorporation under New York law, a contractor would be safer in assuming the language of ConsensusDocs 750 operates as a general incorporation by reference/flow down. If the contractor wants to hold the subcontractor accountable to contract administration, dispute resolution and risk allocation elements of the prime contract, it should do so more specifically, adding language to §3.1.

Often a prime contract with a governmental entity requires that specific provisions be reproduced and incorporated into all subcontracts. In that case, the general incorporation in ConsensusDocs 750 is not sufficient and the contractor should either provide a list of such provisions with section or paragraph references, or reproduce them as an exhibit to the subcontract.

If a subcontract effectively incorporates all terms of the prime agreement, do the terms of the prime agreement simply override and govern over the subcontract terms? The answer is no. If the prime contract is silent on a requirement, where the subcontract is not, the subcontract term will govern. If there are competing provisions, the subcontract terms should control, provided they are not in conflict or interfere with the requirements of the prime contract. E&D

CONSTRUCTION RISK MANAGEMENT REPORTER

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A Labor Law Wedding Story

BY MATTHEW D. BROWN

Much is written about the far reaching nature of New York's "Scaffold Law", Labor Law §240, and the absolute liability owners and contractors face in failing to protect workers from the risks inherent in elevated work sites. Labor Law §240(1) requires owners and contractors to provide appropriate safety devices "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." But seemingly infinite varieties of facts and circumstances lead to numerous and varied court decisions interpreting this statute dating back to the 19th century. The challenge for owners and contractors, and their risk managers, is in knowing where the liability line is drawn and which side of the line they are on. From the Appellate Division, Second Department comes a reminder not to rely upon what might seem like common sense assumptions.

Many a traditional Jewish wedding takes place under a chupah, a canopy symbolizing the home the bride and groom will share as husband and wife. But while the canopy may symbolize a home, is it a structure for Labor Law §240(1) purposes? At least for the chupah at issue in *McCoy v. Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13 (2d Dept 2012), the Second Department's answer was a resounding yes, leaving the

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The Meaningless Certificate of Insurance

BY TIMOTHY D. BOLDT

Have you ever considered whether a certificate of insurance, given to you by one of your subcontractors, is worth the paper it was printed on? If you are like most general contractors in New York, your answer is probably "no." You may even be puzzled by the import of the question. After all, you have a great subcontract form, a process in place for making sure your subcontractors know all of the specific coverages they need to provide, and all of your project managers have it ingrained in their heads that no subcontractor can step foot on a project site until they provide that key document, the all-important certificate of insurance, which proves that the necessary coverages exist.

In June of 2012, New York's highest court held that an insurance company may deny coverage to a named additional insured if the policy contained an exclusion for the type of project at issue. The court also ruled that coverage may not exist for a named additional insured where the subcontractor misrepresented the nature of its business during the underwriting process. *Admiral Ins. Co. v. Joy Contractors, Inc., et al*, 19 N.Y.3d 448 (2012). In the wake of *Admiral Ins.*, it is unclear whether certificates of insurance have any legal significance, other than showing an intent to provide insurance.

In *Admiral Ins. Co.*, a general contractor entered into a subcontract for exterior structural work on a high-rise building in New York City that consisted of luxury condominiums and commercial space. During construction, the subcontractor's tower crane collapsed, killing seven people, injuring dozens, damaging several buildings and destroying one.

The subcontractor had a comprehensive general liability policy with coverage up to $1 million per occurrence and an aggregate limit of $2 million. It also had a follow-form excess policy with limits of $9 million for each loss event and in the aggregate. The general contractor, among others, made a claim against all of the subcontractor's policies. After a complete investigation, the excess carrier denied all claims for coverage, including claims made by the owner/developers, the tower crane's lessor and the general contractor.

The excess carrier gave two reasons for denying coverage. First, the excess policy contained an exclusion for "residential construction activities," defined by the policy as "any work or operations related to the construction of single-family dwellings, multi-family dwellings, condominiums, townhomes, townhouses, cooperatives and/or apartments." Second, the excess carrier provided the policy-based representations of the subcontractor that it specialized in drywall installation; that it did not carry out exterior work; and that it performed no work at a level above two stories in height from grade other than drywall interior work. The excess carrier took the position that these misrepresentations voided the policy, since, as it turned out, the subcontractor was a structural concrete contractor, and was performing work on the entire exterior of a high-rise building with the tower crane. A lawsuit was commenced to determine the validity of these bases for denying coverage.

New York's highest court ruled against the general contractor, upholding the residential construction exclusion, directing only that a trial must occur to determine whether the project was residential within the meaning of that exclusion. This is significant because

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it is based on a liberal interpretation of prior case law, which suggested that the existence of any commercial space on the project negates a residential construction exclusion.[1]

The court further ruled that the excess carrier should have been permitted to pursue its claim that the policy was void based on material misrepresentations of the subcontractor. In reaching this decision, the court rejected well-established case law, which found that misrepresentations by the primary insured, do not affect the coverage afforded to additional insureds.[2] The court of appeals explained that in the prior cases the misrepresentations did not deprive the insurance company of the ability to evaluate the risks for which it was later called to provide coverage. In *Admiral Ins. Co.*, the misrepresentations did exactly this. The court reasoned that the excess carrier, during the underwriting process, evaluated the risk of insuring interior drywall installation, the type of work its insured represented it specialized in. The excess carrier had no reason to evaluate risks associated with exterior construction work including the use of tower cranes. Thus, the only additional insureds that the excess carrier could have reasonably foreseen would be entities associated with projects on which the subcontractor was exclusively performing interior drywall work.

Admiral Ins. Co. should give pause to general contractors performing work in New York. If a subcontractor's insurer can refuse coverage to an additional insured based on a policy exclusion, and if coverage can be denied based on a subcontractor's misrepresentations during the underwriting process, general contractors clearly face the potential for greater risk. At a minimum, do not assume that a certificate of insurance is a guaranty of coverage. Insist that subcontractors provide complete copies of liability policies, and review them to verify coverage. E&D

1 *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins*, 27, A.D.3d 84 (1st Dept 2005)(holding that exclusion in CGL policy for new residential work does not apply to mixed use buildings).

2 *BMW Fin. Servs. v Hassan*, 273 AD2d 428 (2d Dept 2000); *Lufthansa Cargo, AG v New York Mar. & Gen. Ins. Co.*, 40 AD3d 444 (1st Dept 2007); *Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120 (1959); *Morgan v Greater N.Y. Taxpayers Mut. Ins. Assn.*, 305 NY 243 (1953).

No Recovery under Discharge Bond Until Valid Lien Judicially Established

BY THOMAS K. O'GARA

A recent decision out of the Supreme Court, New York County, reaffirmed that an entity filing a lien must establish the validity of the lien before making a claim directly against the lien discharge bond. It is important that contractors not allow their liens, effective for one year from the date of filing, to expire, even if a lien discharge bond has been issued.

In the *Matter of the Ancillary Receivership of the Amwest Surety Insurance Company*, this office, representing a surety that issued a lien discharge bond, successfully dismissed a claim made by a subcontractor against the bond. The claim was dismissed because the subcontractor did not establish the validity of its lien prior to making a claim against the lien discharge bond. The validity of the lien could not be established because the lien expired without commencing a lien foreclosure action.

Subcontractor filed a lien after it had not been fully paid for the improvements made to a Pathmark Super Store in Harlem, New York. The contractor requested that its surety issue a lien discharge bond. The surety's obligation to pay under the lien discharge bond was for "any judgment that may be rendered against said property in any proceeding to enforce the aforesaid lien." Subcontractor filed suit against the contractor and surety seeking full payment and making a claim directly against the lien discharge bond. The subcontractor did not seek to foreclose on the lien. During the lawsuit, the lien expired by virtue of subcontractor's failure to file a lien extension, obtain a court order, or commence a lien foreclosure action.

In reaching its decision, the court looked at the purpose of a mechanic's lien discharge bond. Mechanic's liens are creatures of statute and do not exist in common law. Therefore, a lienor must establish a statutory basis for its claim, and no action against a bond can be maintained after the lien has expired.

The court stated that a lien discharge bond "no longer seeks a judgment of foreclosure against real property, but rather seeks a judgment on the undertaking, in lieu of the real property." But that does not obviate the lienor's need to judicially establish the validity of the lien under the Lien Law before a surety is required to make payment on a lien discharge bond. In this case, because its lien expired, the subcontractor could not judicially establish the validity of its lien. Without a valid lien, the subcontractor was not entitled to recover against the surety's lien discharge bond.

The subcontractor argued that the Lien Law does not require enforcement of a lien against a lien discharge bond, instead, it is merely required to show that the original lien was valid. The subcontractor further argued that this matter should be construed under Lien Law which allows an owner or contractor to file a bond to discharge all liens before any lien has been filed, to protect the owner's title.

The court rejected both arguments. The court held that to assert a claim against a lien discharge bond, the claimants must first judicially establish the validity of the lien. In this situation, subcontractor's lien expired, making it impossible to judicially establish the validly of the lien. The court also rejected subcontractor's assertion that its claim was asserted under Lien Law §37, which would have permitted Subcontractor to assert a claim directly against the bond. There was no indication that Lien Law §37 was ever invoked. In addition, the subcontractor did not comply with the specific procedures and timing requirements. Therefore, even with the liberal construction of the Lien Law, there is no statutory basis for the subcontractor's claim. The subcontractor has filed a notice of appeal.

This case emphasizes that the filing of a lien discharge bond discharges a lien, but does not end the lienor's obligation to adhere to the requirements of the Lien Law. A lienor must still establish the validity of its lien before making a claim directly against the lien discharge bond. A lien cannot be judicially established if it has expired. To keep its lien rights alive, a lienor must extend the lien or foreclose upon it before it expires. E&D

CONTINUED "A LABOR LAW WEDDING STORY"

property owners crying anything but "Mazel tov!"

Over a century ago, the Court of Appeals made clear that the meaning of the word "structure," as used in the Labor Law, is not limited to houses or buildings (see *Caddy v Interborough R.T. Co.*, 195 NY 415). The court stated that "the word 'structure' in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner."

The chupah at issue in *McCoy* was 10-feet high, and made of pipe and wood. After the wedding, the defendant, owner of the wedding facility, provided the plaintiff, a truck driver for a non-party florist, with a six-foot high aluminum ladder, which he used to try and disassemble the chupah. While plaintiff was standing on the ladder, which was being held by another employee, the ladder slipped and plaintiff fell. The plaintiff brought an action for violations of the New York Labor Law, including Labor Law §240(1).

The property owners argued that the chupah did not qualify as a structure, and therefore they should not be subject to the absolute liability of Labor Law §240(1). The lower court disagreed, finding that the chupah in question did qualify as a structure, and granted plaintiff's motion for summary judgment. The Second Department affirmed.

The court noted that New York courts have considered a variety of non-traditional pieces to be "structures" under the scaffold law, such as a ticket booth at a convention center, a free-standing gas-station sign and a tool shed. The chupah at issue in *McCoy* consisted of various interconnected pipes 10 feet long and 3 inches wide, secured to steel metal bases supporting an attached fabric canopy. A ladder plus various hand tools were required to assemble and disassemble the chupah's constituent parts in a process that would take an experienced worker more than a few minutes to complete. While noting that there are a wide variety of chupahs not all of which could be deemed a "structure" under the Labor Law, this chupah, the court reasoned, was more akin to things and devices which courts have recognized as structures.

Whether or not something is a structure is "fact-specific and must be determined on a case-by-case basis." The relevant factors for consideration include, but are not limited to: "the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist." However, the court noted, "no one factor should be deemed controlling."

The lesson for owners and contractors, and their risk managers, is to be ever vigilant in assessing what facts and circumstances might expose them to Labor Law liability. What you assume is not a structure or an elevated site risk, may be just that. For the owner in McCoy, something old (the Labor Law) brought something new (liability), when something borrowed (a chupah) left a worker black and blue. E&D

The Low Down on Flow Down

BY KEVIN F. PEARTREE

Rare is the subcontract agreement that does not contain an incorporation by reference or flow down provision, attempting to bind the subcontractor to terms in the prime contract. Contractors rely upon such provisions while subcontractors are often wary, particularly when the contractor does not make available the very documents it insists upon incorporating into the subcontract.

So what does this provision really accomplish and does it capture all of the obligations the contractor needs or is required to flow down to its subcontractor? The answer lies as much in the contract language employed as it does in the law of the jurisdiction that will be applied when interpreting the contract language.

The ConsensusDocs 750 Standard Form of Agreement Between Contractor and Subcontractor contains language useful in this analysis. ConsensusDocs 750 starts by defining the Subcontract Documents to which the Subcontractor is bound:

> 2.4 SUBCONTRACT DOCUMENTS The Subcontract Documents include this Agreement, the prime agreement, special conditions, general conditions, specifications, drawings, addenda issued and acknowledged prior to execution of this Agreement, amendments, laboratory testing to determine the nature of encountered hazardous materials, other documents listed in this Agreement, and modifications issued in accordance with this Agreement. The Constructor shall provide to the Subcontractor, prior to the execution of this Agreement, copies of the existing Subcontract Documents to which the Subcontractor will be bound. The Subcontractor shall provide copies of applicable portions of the Subcontract Documents to its proposed subcontractors and suppliers. Nothing shall prohibit the Subcontractor from obtaining copies of the Subcontract Documents from the Constructor at any time after the Subcontract Agreement is executed.

This is the incorporation by reference. Frequently, a contract's treatment of the issue ends here. However, with this definition established, Section 3.1 of ConsensusDocs 750 goes on to provide:

> 3.1 OBLIGATIONS The Constructor and the Subcontractor are hereby mutually bound by the terms of this Agreement. To the extent the terms of the prime agreement apply to the Subcontract Work, then the Constructor hereby assumes toward the Subcontractor all the obligations, rights, duties, and redress that the Owner under the prime agreement assumes toward the Constructor. In an identical way, the Subcontractor hereby assumes toward the Constructor all the same obligations, rights, duties, and redress that the Constructor assumes toward the Owner and Design Professional under the prime contract. In the event of an inconsistency among the documents, the specific terms of this Agreement shall govern.

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