Welby, Brady & Greenblatt, LLP

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WELCOME

Message to our Readers

Thank you for reading the 29th issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry.

In this issue, we are pleased to present articles written by our legal staff. Thomas S. Tripodianos, Partner, discusses Budget Resolution Could Mean Prevailing Wage Requirements for Private Improvements and the Impact fo Proposed Steel Tariffs; Gregory J. Spaun, Partner, shares The Insurance Issues Arising from Connecticut's Crumbling Foundations; and Richard T. Ward III, Associate, discusses The Urgency of Filing Liens in Multi-Tier Contracts.

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Budget Resolution Could Mean Prevailing Wage Requirements for Private Improvements

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

The New York State Senate's 2018 Budget Resolution includes language that calls for a "discussion about whether the definition of public work should be updated." It can be construed that this "discussion" opens the door to applying prevailing wage laws to many private construction and improvement projects which were previously not within the definition of public work.

Both houses currently have legislation (S.2975/A.5498) that defines public work so broadly as to encompass construction of private residential buildings, which are assisted only indirectly by government. This bill bootstraps minimum subsidies for affordable housing as the justification to require the wage regimen applied to public works, which inures to the benefit of construction income.

Covered could be any or all of the following:

1. Local real property tax abatement or exemption, which is essential for any construction of one and two family homes in the outer boroughs of the City of New York, or most moderate rehabilitation and new apartment renovation or construction. Real property tax abatement programs are used by local governments outside New York City to promote and target first time homebuyers to assist in the purchase of residential housing. These programs provide assistance to the purchaser, not to the builder/developer.

2. State agency bonds issued under Federal tax exemption rules, which are used to purchase privately issued bank mortgages on one and two family homes and apartments. This program is also directed to the purchaser.

3. Guarantees through SONYMA insurance on State agency bonds which provide credit enhancement to attract private investors in apartment construction or rehabilitation.

The Urgency of Filing Liens in Multi-Tier Contracting

By: Richard T. Ward II, Associate

Richard T. Ward III

Subcontracting is commonplace in the construction industry. The Owner contracts with a General Contractor (GC) who then contracts with one or more subcontractors (Subs) who, in turn, enter into agreements with suppliers and sub-subcontractors (Sub-Subs). While this multi-tiered approach to construction projects is meant to aid in the successful completion of projects by spreading risk and focusing talent, it also has serious implications in terms of the lien rights of the various contractors and subcontractors, especially to those at the lower tiers.

Unlike other areas of the law, the New York Lien Law and the case law interpreting it favors a policy of never forcing anyone to pay twice for the work it contracted to have performed. In order to enforce this policy, the current law provides that a lienor's rights are derivative of each contracting tier above the lienor. In practice, this means that a lienor cannot recover on its lien if any single one of the following three conditions exist on the project at the time the lien is filed: (1) The Owner owes no funds to the general contractor, (2) the general contractor owes no funds to the subcontractor with whom the lienor contracted, or, (3) most obviously, no funds are owed to the lienor. The Supreme Court of New York, for Queens County, recently released a decision in the case of *Trinity Products, LLC v. Carrickmore P&D, LLC*[1] reaffirming and elaborating on this principle.

Carrickmore was the GC on a project in Queens for demolition of an existing building and construction of a new two-story building on the same lot for approximately $2.6 Million (the "Project"). Carrickmore, in turn, subcontracted with J.J.'s Construction Corp. ("J.J.'s") for J.J.'s to perform the earthwork, concrete and steel pipe piles work for the Project. J.J.s then created another tier in the contracting process by using various Sub-Subs on the Project, including the plaintiff in the action, Trinity Products, LLC ("Trinity"). For the early part of the Project, everything seemed to be moving along well. However, in the middle of the Project, J.J.'s began to fall behind in performing its work and paying its subcontractors. Eventually, Carrickmore was forced to terminate J.J.'s due to these, and other failures.

At the time Carrickmore terminated J.J.'s, it had already paid J.J.'s over $2 million (based on J.J.'s requisitions). There was still a balance of approximately $600,000.00 on Carrickmore's contract with J.J.'s; however, J.J.'s had not earned any part of that balance. In fact, after terminating J.J.'s, Carrickmore quickly became aware that J.J.'s previously requisitioned work—for which it had been paid over $2 Million—was incomplete and/or defective in many respects. As Carrickmore still had to fulfill its obligations to the owner, it completed J.J.'s work on its own, utilizing completion subcontractors and suppliers. Carrickmore was able to complete J.J.'s work, although it cost Carrickmore much more than the $600,000 contract balance remaining on its subcontractor with J.J.'s.

After J.J.'s was terminated (and during Carrickmore's completion of J.J.'s work), Trinity filed a lien based on payments it alleged were due and owing to it from J.J.'s. Carrickmore did not owe any funds to J.J.'s at the time the lien was filed due to back-charges associated with completing and correcting JJ's work. Near the time that Carrickmore completed J.J.'s work, Trinity, J.J.'s supplier, brought an action to foreclose on the mechanic's lien in Supreme Court, Queens County.

Carrickmore moved for summary judgment against Trinity, arguing that Trinity could never recover on its mechanic's lien since Carrickmore could establish that it owed no funds to J.J.'s at the time Trinity filed is mechanic's lien (and that nothing thereafter became due from Carrickmore to J.J.'s). The Court granted Carrickmore's motion, reaffirming the caselaw holding that lower tier subcontractors' rights are derivative of their upstream contractors' rights. In essence, even though Trinity, the supplier, was owed money by J.J.'s, the subcontractor, it was unable to recover on a mechanic's lien because J.J.'s had been fully paid by the General Contractor at the time the lien was filed. Trinity's claim was doomed from the start based on the time it filed its lien. Had Trinity filed its lien earlier—prior to J.J.'s being fully paid—it is possible that Trinity could have recovered on its lien.

TAKEWAY: In multi-tier contracting, lower tier subcontractors and suppliers are best protected by filing a notice of mechanic's lien as early as possible. This filing will put the upstream parties on notice of the fact that there are payment issues at one or more tiers of the project. It also potentially protects party filing the lien from a defense based upon full payment (payments made after the lien is filed generally do not constitute a defense to a lien claim, while payments made before the lien is filed do generally constitute such a defense). Lienors should also be aware of potential for recovery under payment bonds, which can provide relief to contractors who, for one reason or another, may not have rights under the Lien Law. If in doubt on whether and/or how to file a lien, contractors should contact their construction attorney.

[1]Trinity v. Carrickmore et. al., Supreme Court of the State of New York, Queens County, Index 708799/2015, Decision dated December 22, 2017.

The Insurance Issues Arising from Connecticut's Crumbling Foundations

By: Gregory J. Spaun, Partner

Gregory J. Spaun

Homeowner's insurance policies are designed to cover many of the "ordinary" perils that a home may face such as fire, theft, a falling tree and the like. However, because not every eventuality can be foreseen, various insurance carriers' policies are written to account for the "extraordinary" eventualities in different ways. For instance, a building collapse may be excluded by excluding some of its causes, such as "earthquake", or "earth movement". A building collapse may also be excluded by reference to its nature; sudden versus gradual. Typically, your average Connecticuter would not have much of a worry about an earthquake-type policy exclusion since your average Nutmeg State earthquake—which is a rare event in and of itself—does nothing more than rattle the knickknack shelf. However, a building can collapse for other reasons, such as substandard construction methods or materials. This is a real worry for those whose homes were constructed of concrete supplied by the JJ Mottes Company in the 1980's and 90's.

In the recent case of *Metsack v Liberty Mutual Fire Insurance Company and Allstate Insurance Company* (2017 WL 706599; 14-CV-01150[VLB]), the United States District Court for the District of Connecticut was confronted with two different insurance policies covering a home with a JJ Mottes foundation. The plaintiffs, the Metsacks, had owed the home since it was constructed in 1992. The Metsacks' home had been insured by Allstate from the time of its construction through September of 2009, and by Liberty Mutual since. In the years following the construction, the Metsacks noticed minor cracking in the foundation, commencing prior to 2008. Despite these cracks, no problems were perceived with the foundation until April of 2014, when they noticed water infiltrating into the basement. Around that same time, a friend of the Metsacks observed the cracking and suggested that they speak with a contractor. During their conversation with the contractor, the Metsacks first learned that their foundation may be affected by the defective JJ Mottes concrete.

The Metsacks placed claims with both insurance carriers, and the separate experts retained by the Metsacks and the carriers confirmed that the foundation was, indeed, made of defective concrete. The Metsacks' expert went further and opined that although the house was still safe to live in, the horizontal cracks indicated that the foundation was substantially impaired (which generally occurs between ten and eighteen years after the foundation is poured), and that the foundation walls will continue to weaken until they can no longer support the weight of the home. Both insurance carriers denied the Metsacks' respective claims, and the Metsacks sued both carriers for coverage under the policies.

Both insurance carriers moved for summary judgment, arguing that the language of their respective policies barred the Metsacks' claims. The Liberty Mutual policy language provided that the policy covered "direct physical loss … involving collapse of a building or any part of a building caused only by one or more of the following … (b) Hidden decay … or (f) Use of defective material or methods in construction, remodeling or renovation." The Liberty Mutual policy excluded loss of a foundation, "unless the loss is a direct result of the collapse of a building", as well as "settling, cracking, shrinking, bulging or expansion". The Court rejected Liberty Mutual's argument that the collapse had to effectively result in the building's crumbling or becoming uninhabitable, finding that case law which provided that the "substantial impairment" of a building "so severe as to materially impair [its] ability to remain upright" sufficed. The Court also brushed back Liberty Mutual's contentions that the structure at issue was not a foundation, and that the loss occurred outside of the policy period, finding that there were questions of fact as to whether these exceptions applied and that these issues had to be put to a jury. The Allstate policy similarly covered collapses caused by defective methods or materials used in construction. However, unlike the Liberty Mutual policy, the Allstate policy required that any such collapse be "sudden and accidental". Based on that language, the Court found that Allstate established, as a matter of law, that there could be no circumstances under which the Metsacks' claims against the Allstate Policy could be viable.

The takeaway from the Metsack case is that a homeowner—or any property owner, contractor, or anyone else covered under an insurance policy—needs to carefully read their policies to see what is, and what is not, covered. If you have any questions about what may be buried deep in your insurance policy, you should reach out to your insurance professional or your attorney.

Scan here to learn more about Richard T. Ward III

Scan here to learn more about Gregory J. Spaun

Impact of Proposed Steel Tariffs

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

President Trump announced on Thursday March 1, 2018 that his administration intends to impose a 25 percent tariff on imported steel and a 10 percent tariff on imported aluminum. Many details are lacking and official administrative action has not yet been implemented. Some countries may be exempt so the breadth of the tariffs is not yet known.

The construction industry relies on steel and aluminum and will likely face higher prices. Price escalation may result in delays, , a reduced scope, or projects being cancelled and a force majeure declared or a termination for convenience provision being exercised. Escalation clauses could also impact public projects adversely due to the fact that bidders cannot hold their prices for an extended period of time.

If you don't have an escalation clause, you may be at the mercy of the owner to allow a change order for the increased material costs or you may be able to rescind.

If you'd like to discuss ways to manage this risk please review your agreements and speak with counsel about what steps you should consider.

Scan here to learn more about Thomas S. Tripodianos

Jared A. Hand Selected to the 2018 New York Metro Rising Stars List

Jared A. Hand

Jared A. Hand has been selected to the 2018 New York Metro Rising Stars list by Super Lawyers Magazine.

This honor is reserved for those lawyers who exhibit excellence in practice. Only 2.5% of attorneys in the New York Metro region receive this distinction.

Mr. Hand is an Associate at Welby, Brady & Greenblatt, LLP where heguides his clients through a wide variety of legal issues ranging from complex contract disputes, to lien foreclosures and litigation. Mr. Hand also has significant experience representing and advising owners, developers and contractors on a wide variety of construction related transactions by drafting and negotiating various development, design and construction agreements. He is admitted to practice law in New York and New Jersey.

Scan here to learn more about Jared A. Hand