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WELCOME

Message to our Readers

Thank you for reading the 30th 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 Associates. Michael I Silverstein discusses labor Law Section 220 and that it Provides a Direct Right of Action to Workers to Assert Claims Against Contractors for Payment of Prevailing Wage and Benefit Rates; Robert W. Bannon, II, shares What Type of "Pre-Construction" Services Can You Lien For?: and Frank Gramarossa presents Do You Know if Your Lien Was Filed Corretly?.

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DO YOU KNOW IF YOUR LIEN WAS FILED CORRECTLY?

By: Frank Gramarossa, Esq., Associate

Frank Gramarossa

New York's Lien Law is quite specific on the requirements of a notice of lien. So what happens when a lien does not strictly comply with those requirements? This very issue was recently analyzed by the Appellate Division, Second Department in the case of Park Side Constr. Contrs., Inc. v. Bryan's Quality Plus, LLC (156 AD3d 804).

In Park Side, the plaintiff was Park Side Constr. Contrs., Inc., a general contractor who hired Bryan's Quality Plus as its piling subcontractor to perform drilling services at 2 different sites. During construction, Bryan's Quality Plus had difficulty with the soil at the Brooklyn site, and it had to use alternative means and methods to complete its work. When it was complete, Bryan's Quality Plus submitted a claim for the additional costs associated with the unexpected changes. At the Manhattan site, Bryan's Quality Plus ordered materials but could not start work due to a stop work order. Park Side did make payments for materials, and Bryan's Quality Plus kept materials in storage with the expectation that it would use them when the job started. However, when the work commenced, Park Side hired a different subcontractor to perform the work.

As a result, Bryan's Quality Plus filed 2 liens: one for the additional costs associated with the alternative means and methods used at the Brooklyn project, and the other for the alleged unpaid balance for materials at the Manhattan site. In response, Park Side sued Bryan's Quality Plus for: 1) an order of seizure of materials it purchased for the Manhattan site; 2) a declaration that liens were willfully exaggerated and void under Lien Law §39; and 3) damages for the amounts demanded by the liens in excess of costs and materials actually provided. Bryan's Quality Plus counterclaimed to foreclose mechanic's liens, and for breach of contract.

Prior to trial, Park Side file a motion to summarily

Continued on Page 2

Continued from Page 1

discharge the liens because they included Park Side's post-office box address rather than its principal place of business. Bryan's Quality Plus filed a cross-motion for leave to amend the liens nunc pro tunc, essentially asking the Court to amend these apparently harmless defects. The trial court ruled that despite the defect, the use of a post office box address rather than the address of a foreign corporation's principal place of business within the state is a non-jurisdictional defect – one that the Court, within the discretion afforded by Lien Law §12-a, was willing to correct. The Appellate Division, Second Department ruled that the trial court properly exercised its discretion.

The lesson to be learned is this: while the subcontractor in this situation was allowed to retroactively amend its liens after making the proper application to the Court, it incurred unnecessary legal expenses to preserve its liens. This could have been avoided had they consulted with an attorney prior to filing the lien. It is important to receive good legal counsel at the outset of a dispute, particularly from attorneys who are well-versed in the Lien Law and its requirements. However, if you do find yourself in the unfortunate situation of filing a facially-defective lien, you are not without hope – contact a knowledgeable attorney who can make the appropriate petition to the Court preserve your rights.

Scan here to learn more about Frank Gramarossa

LABOR LAW SECTION 220 PROVIDES A DIRECT RIGHT OF ACTION TO WORKERS TO ASSERT CLAIMS AGAINST CONTRACTORS FOR PAYMENT OF PREVAILING WAGE AND BENEFIT RATES

By: Michael I. Silverstein

Michael I. Silverstein

In Agolli v. PS Contracting of NJ Inc. (Supreme Court, N.Y. County, Nov. 29, 2017), plaintiffs, two laborers employed by defendant PS Contracting of NJ, Inc. ("PS Contracting") brought a class action lawsuit for breach of contract on behalf of themselves and all other similarly situated persons who furnished labor to defendants PS Contracting and two other contractors, Zoria Housing, LLC ("Zoria Housing"), and Technico Construction Services Inc. ("Technico Construction") on three different projects. The plaintiffs alleged that these defendants breached their public work contracts with the New York City Housing Authority ("NYCHA") when they failed to pay the plaintiffs prevailing wage rates, supplemental benefits, and overtime wages as required by Section 220 of New York's Labor Law. The plaintiffs specifically alleged that Zoria Housing and Technico Construction Services entered contracts with NYCHA around 2009 to manage and perform construction projects at various sites owned by NYCHA. The two named plaintiffs performed construction work for PS Contracting, a subcontractor for Zoria Housing and Technico Construction Services, on these public work projects. The purported class included workers of any one of these three defendants. The plaintiffs claimed that Labor Law Section 220 required Zoria Housing and Technico Construction Services, either themselves or through their subcontractor PS Contracting, to pay laborers working on these projects "not less than the prevailing rate of wages," supplemental benefits, and prevailing "premium wages" for "overtime work." Each contract for the projects included a schedule of prevailing wage and benefit rates.

The defendants, including Zoria Housing's payment bond surety, unsuccessfully moved to dismiss the

Continued on Page 3

Continued from Page 2

workers' lawsuit. On the motion to dismiss, the defendants first argued that the complaint lacked the specificity required to state a claim for breach of contract. The the Court disagreed, finding that the complaint identified the parties and projects covered by the contracts under which the plaintiffs made their claim. The complaint further alleged that those contracts obligated defendants to pay the plaintiffs prevailing wages and benefits according to Labor Law Section 220, as third party beneficiaries of the defendants' contracts with NYCHA. Finally, the plaintiffs alleged that the defendants violated those contracts by failing to pay them the statutorily required wages and benefits. The Court found these allegations were sufficient to sustain plaintiffs' breach of contract claims. In doing so, the Court observed that at the pleading stage of litigation, the plaintiffs need not specifically identify the contracts under which they claimed payment, and it was sufficient that they have identified the construction projects that the contracts cover, and that they have specified that the complaint refers to the contracts requiring defendants to pay plaintiffs prevailing wages according to Labor Law Section 220.

The defendants' second ground for dismissal was equally unavailing. Here, the defendants relied a provision of their contracts with NYCHA, which read, as follows:

> DISPUTES CONCERNING LABOR STANDARDS
> Disputes arising out of the labor standards provisions of this Contract shall not be subject to the general disputes clause of this Contract. Such disputes shall, be resolved in accordance with the procedures of the Department of Labor set forth in 29 C.F.R. parts 5, 6, 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the Authority, the U.S. Department of Labor, or the employees or their representatives.

The defendants maintained that this section of the contract required the plaintiffs to resolve their dispute over prevailing wage rates, supplemental benefits, and overtime wages under the procedures set forth in 29 C.F.R. Parts 5-7, the application of which would have divested the Court of jurisdiction to hear

plaintiffs' claims. The Court, however, did not agree, noting that the cited sections of the C.F.R. only applied to challenges in the prevailing wage rates, and that the plaintiffs were not challenging the prevailing wage and benefit rate schedules in the public work project contracts but, rather, the defendants' failure to pay those wage and benefit rates, as defined in those schedules, in the first place.

The lesson to be gleaned from the Court's holding is a reminder that Section 220 of the Labor Law not only provides the Department of Labor with an administrative remedy against the contractor, but it also provides the workers with a direct right of action. This direct right not only includes the worker's employer, but contractors upstream from the worker's employer. Accordingly, contractors on public works projects would be cautioned to not only ensure that they are paying their workers proper prevailing wage and benefit rates, but to ensure that their subcontractors are as well.

Scan here to learn more about Michael I. Silverstein

WHAT TYPE OF "PRE-CONSTRUCTION" SERVICES CAN YOU LIEN FOR?

By: Robert W. Bannon, II, Associate

Robert W. Bannon, II

In a recent New York case, an interesting question arose as to the type of pre-construction services for which a construction professional can file a lien. Generally speaking, if you perform work and you are not paid for labor or services utilized "for the improvement of real property" you are permitted to file a mechanic's lien. A mechanic's lien is a powerful tool to secure payment, but is equally fraught with perils if not carefully prepared. In the pre-construction context, you can file a lien for certain services even if a project never proceeds to completion. However, determining what type of services you can lien for is often tricky. An improper description of your work or services provided can result in the lien being challenged and, ultimately, dismissed.

In The Matter of the Application of Old Post Road Associates, LLC, 2018 WL 2209500 (Sup Ct, Westchester County, 2018), petitioner, Old Post Road Associates, LLC ("Old Post Road Associates"), sought to summarily discharge a lien filed by LRC Construction, LLC ("LRC"), pursuant to Lien Law § 19(6). LRC, in its lien, claimed it provided "pre-construction management services" for the owner, Old Post Road Associates. The owner did not dispute that it engaged LRC to perform certain "pre-construction management services" in connection with a planned construction project on its property. LRC claimed the services it performed included updating the project budget, attending meetings with consultants to discuss construction phasing and reviewing documents in connection with the site plan approval. Old Post Road Associates argued that LRC provided these services "gratis" in the hope of being retained as the project construction manager. LRC disagreed, claiming that it provided these services for eleven (11) months until it was terminated, and it should be compensated. Obviously, LRC was not retained as the project construction manager, and both parties unsuccessfully attempted to negotiate a settlement. LRC then filed a mechanic's lien for the services in the amount of $225,000, and Old Post Road Associates filed a petition to discharge the lien.

Supreme Court acknowledged that little guidance exists as to what type of work falls within and outside the category of "improvements" for which a lien can be filed. Analyzing an almost one-hundred-year-old case, the Court noted that the Lien Law does not cover services associated with procurement of subcontractors and "applying for permits and approvals", as that type of work is not "the work of improving property". Old Post Road Associates argued that the description of labor and services in the lien did not provide the basis to file a lien and, thus, the lien should be discharged. LRC countered that the Lien Law is subject to a liberal construction in favor of contractors. The Court ultimately concluded that LRC's description in the lien for "pre-construction management services" does not automatically render the lien defective. Interestingly, the Court permitted LRC to submit an affidavit further describing the services it provided for the Project and found that the more detailed description in the affidavit was sufficient to permit the lien to stand—although some of the described work may be non-lienable.

Although LRC was able to dodge dismissal, the case should serve as a warning against filing a lien that contains any description of services which do not fall under the Lien Law. All mechanic's liens filed in New York must contain a concise statement describing the work, labor or services that were provided for the benefit of a construction project. It is important to remember that the stakes are high because even one mistake can render your lien fatally defective. For pre-construction services, make sure the services you provided are allowable under the Lien Law, and be very specific as to the services performed. Often, being overly detailed, rather than using generalizations, can help avoid an early challenge to the lien and, as discussed above, can even result in the lien surviving an attempt at dismissal.

If you would like more information on this issue or any other construction related issue, please contact Welby, Brady & Greenblatt, L.L.P., at (914) 428-2100.

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Scan here to learn more about Robert W. Bannon, II