WELBY, BRADY & GREENBLATT, LLP
ATTORNEYS AT LAW

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REPORT

WELCOME

Message to our Readers

Thank you for reading the Spring 2015 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 as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve.

In this issue, we are pleased to present Legal Alerts written by our team. Robert W. Bannon, II, Associate, shares a Best Practice for Timely Written Notifications of Delay and Extra Work Claims; Alexander A. Miuccio, Esq., Partner, presents Court Rejects Subcontractors' Claim Against Owner; and Lester Gulitz, Of Counsel, discusses Failure to Pay Subcontractor Relieves Subcontractor's Performance Of Its Remaining Obligations Under the Contract.

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LEGAL ALERT:

Failure to Pay Subcontractor Relieves Subcontractor's Performance Of Its Remaining Obligations Under the Contract

By: Lester Gulitz, Counsel to Welby, Brady & Greenblatt, LLP

Lester Gulitz

A general contractor that expects to hold its subcontractor to the subcontractor's obligations under the subcontract must be able to demonstrate that it complied with its own obligations under that contract. Failure to show such compliance can relieve the subcontractor from its remaining obligations under the subcontract.

In *U.W. Marx, Inc. v. Koko Contracting, Inc.* (124 AD3d 1121 [3d Dept 2015]), the general trade contractor did not pay its roofing subcontractor for three months, alleging that the subcontractor failed to provide all the necessary documentation required under the terms of the subcontract and a supplementary contract. After not being paid for July, August and September, on October 31 the subcontractor removed its workers from the project site. On November 3, the general contractor gave the subcontractor a three-day notice to cure its default. On November 6, the subcontractor belatedly gave the general contractor a seven-day notice of its suspension of work, based upon non-payment, under Section 4.7.1 of the contract. Section 4.7.1 followed the AIA standard form, which provided:

> "If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the

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> Contractor, stop the work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization."

The general contractor sued the subcontractor for breach of contract based on its failure to perform its work. The subcontractor commenced a separate suit against the general contractor and its payment bond surety, and the two actions were joined for trial. After that (non-jury) trial, the lower court found that the general contractor's proffered reasons for withholding payment were unsubstantiated and unjustified and, therefore, the general contractor's failure to pay was a material breach of the contract. The general contractor and its bonding company appealed.

Conceding its material breach, the general contractor argued to the appellate court that the subcontractor was precluded from any recovery against the general contractor because the subcontractor suspended its work without complying with the provisions of section 4.7.1. of the contract.

The appellate court was not persuaded by the general contractor's argument. While it was clear that the subcontractor did not comply with section 4.7.1, the general contractor's material breach, said the appellate court, was an uncured failure of performance that relieved the subcontractor from performing its remaining obligations under the contract.

BEST PRACTICE:

Provide Timely Written Notification of Delay and Extra Work Claims

By: Robert W. Bannon, II, Associate

Robert W. Bannon, II

One practice that all contractors should get in the habit of is to provide timely written notifications of all delay and extra work claims. Simply put, do not be lulled into noncompliance even if you believe the owner/general contractor is aware of your claim—it will likely result in a loss of an otherwise viable claim. Of course, delivering high quality construction services is important, but it is also important to keep "high quality records". Undoubtedly, if reviewing well-kept records and notifications permits an owner/general contractor to more efficiently complete a project and minimize delays, they are more likely to pursue a continued business relationship with that contractor. Again and again, contractors are advised to document all claims on a construction project, provide timely notice and to familiarize themselves with any contractual notification requirements. In the recent decision in *Fahs Construction Group, Inc. v. State of New York* (123 A.D.3d 1311 [3d Dept 2014]), the Appellate Division, Third Department, highlights the costs of a failure to do so.

The dispute in *Fahs Construction Group* arises out of a 2003 project for the reconstruction of a bridge and stretch of a state highway. The contractor completed the project after the project deadline, alleging that the delays were caused by the owner's addition of work to the contract without a

sufficient extension of time. The contractor filed a breach of contract claim, which was dismissed upon the owner's motion for summary judgment. The contractor appealed.

The Appellate Division upheld the lower court's decision, finding that contractor failed to provide contractual notification for its delay and extra work claims, and failed to keep and furnish certain records of damages to the owner. The contractor had argued that the owner had waived its noncompliance, had actual knowledge of the contractor's claim, and had prevented it from complying with the contractual requirements. The Appellate Division was not persuaded by these arguments and enforced the contractual provision that required strict compliance with all notice requirements and explicitly made all such requirements a condition precedent to payment. Importantly, the Appellate Division was unmoved by the contractor's claims that the owner had actual timely knowledge of the delay and extra work claims. The contractor's "actual notice" argument was doomed by a contractual provision stating that even if the owner may "have actual notice of the facts and circumstances which comprise such dispute", its failure to supply required notice and records is deemed a waiver of any related claim.

The contractual notice and record keeping provisions clearly placed a burden on the contractor and required it to document any delay or extra work claims. However, from the owner's perspective, such provisions are in place to ensure that costs and delays are minimized. In this case, the contractor has only itself to blame for the failure of its claims because it either failed to read and understand the notice requirements or ignored them to its detriment.

Fahs Construction Group provides a reminder to all contractors to carefully read and understand the notice and record keeping requirements set forth in the contract. For more complicated contractual provisions, it is advisable to review these requirements with an attorney—both before entering into the contract and during a project so as to ensure continued compliance. Moreover, even without contractual notice and record keeping requirements, contractors should strive to follow the best practice of providing notice of any potential claim at the earliest possible time—and supplementing the claim with additional information as it becomes available. In doing so, a contractor may avoid the fate of Fahs Construction Group and recover for meritorious delay and extra work claims.

Court Rejects Subcontractor's Claim Against Owner

By: Alexander A. Miuccio, Esq. CIC & BCA General Counsel

Alexander !. Miuccio

Where an unpaid subcontractor is unable to recover from its contractor, the subcontractor sometimes seeks to recover from the owner based on the legal theory of unjust enrichment. This equitable remedy is typically invoked to prevent an owner from being unjustly enriched at the subcontractor's expense.

In the construction litigation context, however, the owner's liability to a subcontractor under an unjust enrichment theory is dependent on the owner's agreement to pay the subcontractor or other circumstances giving rise to such an obligation, as recently shown in the case of *Sears Ready Mix v Lighthouse Marina, Inc.*

Background

Sears Ready Mix was retained by VMA Concrete Construction to pour concrete for VMA at a premises owned by defendant Pierro-Gallasso. VMA had been retained to perform its concrete work by Pierro-Gallasso's tenants, defendants Lighthouse Marina and Larry's Lighthouse. VMA apparently became insolvent prior to making full payment to Sears Ready Mix.

Sears Ready Mix commenced a lawsuit against VMA, the

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owner and the Lighthouse tenants to recover under the theory of unjust enrichment. VMA failed to respond to the lawsuit and a default was taken against it. Sears Ready Mix's claim against Pierro-Gallasso and the Lighthouse tenants claimed that they benefitted from Sears Ready Mix's work and were unjustly enriched as a result of VMA's failure to remit full payment. The owner and the tenants moved to dismiss the unjust enrichment claim, arguing that they could not be held liable when Sears Ready Mix's contract was with VMA. Sears Ready Mix acknowledged the general law prohibiting a subcontractor from recovering from the owner, but claimed that it should receive payment notwithstanding because the Lighthouse tenants knew about, and acquiesced to Sears Ready Mix's work. Sears Ready Mix also claimed that the Lighthouse tenants were interested in settling VMA's debt to Sears Ready Mix, thus assuming VMA's obligation.

Decision

The trial court dismissed Sears Ready Mix's unjust enrichment claim, and the appellate court affirmed that decision. In doing so, the appellate court noted the settled law that a property owner who contracts with a general contractor does not become liable to a subcontractor on an unjust enrichment theory unless it can be demonstrated that the owner consented to pay for the subcontractor's work. The mere fact that the owner and tenants received some benefit from Sears Ready Mix's work was insufficient to recover on the unjust enrichment theory because Sears Ready Mix also failed to show that it was working for the owner and tenants when it performed its work.

Comment

This case shows how difficult it is for a subcontractor to recover from the owner under a theory of unjust enrichment. It is not enough to simply state that the owner received a benefit from the subcontractor's work. The subcontractor must also prove that the owner in some way expressed a willingness to pay for the subcontractor's work or otherwise assumed an obligation to pay for that work.