WELBY, BRADY & GREENBLATT, LLP
ATTORNEYS AT LAW

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REPORT

WELCOME

Message to our Readers

Thank you for reading 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. Partner Thomas S. Tripodianos discusses whether an architect can recover from services rendered where there is no written contract; Associate Richard T. Ward, III, discusses the ever important subject of getting paid for your extra work; and Associate Robert W. Bannon II, discusses how a contractor's lien waiver does not necessarily bar claim for unpaid work.

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Getting Paid for Your Extra Work

By: Richard T. Ward, III, Associate

Richard T. Ward, III

Most construction contracts with an agreed upon base price will provide for adjustment of the schedule and price if the contractor performs work that is additional to the scope originally agreed upon. Such adjustments, which are often crucial to the contractor making a profit on a job, typically place notice requirements on the contractor, especially on public projects. The contractor's failure to precisely follow these notice requirements, which can be burdensome in terms of time requirements and substance, can be fatal to the contractor's extra work claim.

The importance of following contractual notice requirements for extra work is highlighted by a recent decision of The New York Appellate Division, Third Department, in the case of *Ridley Electric Company, Inc. v. DASNY*[1] Ridley entered into a contract with the Dormitory Authority of the State of New York ("DASNY") to be the prime contractor on a New York State public project for construction of the New York State Veteran's Home (the "Project"). During Ridley's performance of its work, issues arose relating to the design of the Project ceiling, causing DASNY to make various adjustments on the Project so Ridley could complete its work. Ridley substantially completed its contract work, including work Ridley considered extra, by September of 2008. In March of 2009, Ridley requested payment for the alleged extra work it performed relating not only to the ceiling issue, but also to cleanup work it performed. In February of 2010, DASNY responded to Ridley's request, agreeing Ridley was due compensation for certain extra work, but solely relating to the ceiling issue. DASNY also provided proposed change orders for the

Continued on Page 2

Continued from Page 1

extra work relating to the ceiling issue. Ridley refused to execute DASNY's proposed change orders because of pricing issues, and it set forth proposed change orders of its own. DASNY refused to execute the change orders proposed by Ridley.

Based on this disagreement, Ridley sued DASNY in Supreme Court for breach of contract seeking its contract balance and delay damages. DASNY asserted a defense based on Ridley's failure to follow the contractual notice requirements. The contract between Ridley and DASNY provided that DASNY could order Ridley to perform extra work and would use change orders to adjust the contract price accordingly. It also provided that if Ridley believed it was ordered to perform work that was extra, Ridley had to notify DASNY of this claim in writing within 15 days of being ordered to perform allegedly extra work, and follow up by submitting an estimate of anticipated cost within 30 days. The contract further provided that Ridley's failure to comply with these requirements would constitute "a conclusive and binding determination on the part of the contractor that the work in question does not involve extra work…and, also, a waiver… of all claims for additional compensation or damages as a result of the work.". During motion practice, Supreme Court found that Ridley had failed to follow the extra work notice and reporting requirements, and it dismissed Ridley's complaint.

Ridley appealed to the Appellate Division, Third Department. Ridley conceded that it did not comply with the contractual extra work notice and reporting requirements, but argued that the Supreme Court erred in dismissing its complaint as DASNY: (1) knew Ridley was performing extra work; and (2) waived its defense of the notice requirements by acknowledging Ridley was entitled to extra compensation in its March 2009 correspondence. The Third Department affirmed the Supreme Court, citing Ridley's failure to comply with the notice requirement by making its claims in March of 2009, long after the notice period in the contract expired. The Court also specified the importance of notice requirements in keeping owners aware of budget updates, especially on public projects where there is an important interest in avoiding the waste of public funds. Based on this important interest, the Third Department required that the notice requirements "must be literally performed", dooming Ridley's claim to extra compensation in connection with both the ceiling and clean up work.

Importantly, the Court found that even though DASNY had admitted that it was aware of Ridley's entitlement to compensation for extra work related to the ceiling issue, without proper notice of its extra work claim being made, Ridley had no viable claim. It also rejected Ridley's point that the March 2009 letter constituted a waiver of the extra work notice requirement. In doing so, the Court noted a waiver can only be accomplished through an "explicit, unmistakable and unambiguous" act. It also pointed to contract provisions which provided that certain actions by DASNY, such as ordering extra work, issuing change orders, and making partial payments could not be construed as waivers of contract terms.

TAKEWAY: Contractors can often end up in contracts that place onerous requirements on the contractor in connection with claims for extra work. These provisions are enforceable limitations on the rights of the contractor, and are strictly enforced especially, on public projects. Accordingly, it is important that contractors note what notice requirements exist for extra work claims (and other contingencies) when negotiating contracts, and must remain aware of these requirements during performance of the work. If in doubt, contact your construction attorney to help you preserve your claims.

[1] Ridley Elec. Co., Inc. v Dormitory Auth. of State, 152 AD3d 1129 [3d Dept 2017]

Can an Architect Recover for Services Rendered Where There is No Written Contract?

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

Question. Can an Architect recover for services rendered where there is no written contract?

Answer. Maybe, depending on the proof offered.

Architect seeks to recover for statements rendered in connection with architectural design work Architect did on three projects. The only written contract executed by the parties relates to one of the three projects.

It is undisputed that Architect received payments for work he did on each of these projects and equally undisputed that Architect rendered statements that were not fully paid for each of these projects. Architect has asserted claims for breach of oral contract, quantum meruit, account stated, and unjust enrichment on the two projects where there was no written contract and a claim for breach of a written contract for the unpaid balance on the third project.

The Owner claims that the alleged oral contracts could not have been performed within one year and therefore are unenforceable. The Owner further claims that bills for the projects lacking a written agreement were submitted after the work was done, were protested, and greatly in excess of anything the Owner authorized and thus cannot be the predicate for an account stated claim. And, finally, Owner assert that Architect failed to complete the third project and was, in all events, fairly compensated for his work on the third project before he breached the written contract by failing to complete the contracted for work.

From here on in we will focus on the projects for which there was no written contract.

Architect has proof of substantial design work on the projects as well as statements for services rendered. Architect alleges that he was fully authorized to perform all of the work and that Owner never contested the propriety of any of the statements rendered. By contrast, Owner, alleges he had more than a half dozen in person meetings and telephone calls with Architect challenging the scope of the work, much of which was either, in Owner's view, unnecessary or untimely. While Owner acknowledged that he engaged Architect to perform work on all three projects, Owner asserted that the work Architect did was beyond the scope of anything Owner authorized and much of it was unnecessary, if not worthless.

The first issue is whether the oral contracts were capable of being performed within one year and thus are enforceable. New York General Obligations Law §5-701(a)(1) requires a writing for an agreement if such agreement "by its terms is not to be performed within one year from the making thereof…." It has been well-settled by the Court of Appeals of New York that §5-701(a)(1) applies to only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year. The determination of whether an alleged oral contract can possibly be performed within one year from its making is not conducted by looking back at the actual performance, but rather, requires analysis of what was possible, looking forward from the day the contract was entered into. Both projects contemplated multi-year schedules and phases and, looking forward from the time the oral agreements were originally entered into, were incapable of being performed within a year. Therefore, the oral contracts are unenforceable under the Statute of Frauds.

The second issue is whether Architect made a prima facie case that he was entitled to judgment for account stated for the projects. The Architect can make a prima facie case of entitlement to judgment as a matter of law for account stated by establishing that she entered into an agreement with the Owner and sent him regular invoices pursuant to that agreement, to which the Owner did not object. This is ultimately an issue of credibility.

The third issue is whether Architect sufficiently presented evidence supporting its claim for *quantum meruit*. The elements of *quantum meruit* are: (1) the performance of services in good faith, (2) the acceptance of services by the person to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of services rendered. Architect proved that his architectural services were performed and that he expected to be compensated for them. Manifestly, Architect did not work beyond the conceptual phase of both projects with the intent to deceive Owner. Architect believed that Owner's office authorized each phase of the projects Architect worked on. Furthermore, by submitting invoices to Owner, Architect clearly expected to be compensated for his architectural services and, indeed, received partial payment for his work.

There is evidence that subordinates of Owner accepted Architect' architectural services. Owner accepted Architect' architectural services for the conceptual phase of both projects since he compensated Architect for such work. But the Owner had numerous conversations with Architect objecting to the work beyond the initial phase.

In addition, Architect failed to provide evidence of the reasonable value of his architectural services beyond the statements he sent for the services he rendered. And, as previously noted, much of the work for which Architect seeks to recover was either unnecessary or of no ultimate value to the Owner.

Continued on Page 4

Continued from page 3

Because the parties never entered into a written contract, the only evidence of rates presented was the unsigned proposal and Architect's testimony. And, Owner's expert witness disputed the standard industry rates for such projects. For all these reasons, Architect is entitled to no more than he was paid on a *quantum meruit basis*.

Contractor's Lien Waiver Does Not Bar Claim for Unpaid Work

By: Robert W. Bannon II, Associate

Robert W. Bannon, II

A waiver of lien can serve as an effective tool to bar unanticipated claims for unpaid/extra work on a project. Although Courts will generally enforce an executed lien waiver as a bar to such claims, that is not always the case. In *Shamrock Materials LLC v. Impact Environmental Engineering, PLLC* (149 A.D.3d 1001 [2d Dept 2017]), the Appellate Division, Second Department, addressed the issue of the enforceability of a lien waiver.

The dispute in *Shamrock Materials LLC* arises out of a 2009-2010 project to lengthen and widen the Bay Runway at John F. Kennedy International Airport ("Project"). Tutor Perini served as the general contractor who subcontracted work to defendant, Impact Environmental Engineering. Impact Environmental Engineering, in turn, entered into a subcontract with the plaintiff, Shamrock Materials, for the removal and disposal of about 240,000 cubic yards of excavated materials. The price for Shamrock's work was an allegedly agreed upon unit price, which was dependent on the type of material, screening needs and method of transport. Shamrock Materials claimed that it was still due and owing at least $458,450.75 in connection with the Project. Impact Environmental claimed, among other things, that during the course of the Project Shamrock Materials executed lien waivers waiving such claims, and that Impact Environmental had actually overpaid and, as a result, was owed a credit of $57,178.96.

Shamrock Materials filed a breach of contract lawsuit, which proceeded to trial. Initially, Impact Environmental moved for judgment as a matter of law, contending that Shamrock Materials had waived its claim based on a series of executed lien waivers. The Court denied this motion and permitted the jury to determine the parties' intention as to the effect of the lien waiver documents. At trial, the jury returned a verdict in favor of Shamrock Materials in the total amount of $547,278.61, plus interests and costs.

The Appellate Division upheld the lower court's decision, finding that "the evidence at trial failed to establish, as a matter of law, that the plaintiff waived its claim to recover" the unpaid amounts. In its decision, the Appellate Division cited *Penava Mech. Corp. v Afgo Mech. Servs., Inc.* (71 AD3d 493, 495 [1st Dept 2010]). In Penava, it was held that the parties' course of conduct was such that the subcontractor was required to sign waivers whenever it received payments, and that "the parties treated the waivers as mere receipts of the amounts stated in the waivers, not as complete waivers of all claims to that point".

It should be noted that courts will generally enforce waiver and release documents to the extent that they are a true reflection of the intent of the parties. If there is evidence that the parties course of dealing is inconsistent with the terms of the release document, a court may decline to enforce the waiver and release against the contractor. Here, Shamrock was ultimately able to recover for unpaid work, but this result is more the exception than the rule. All too often contractors fail to carefully read waiver and release documents in the hope of receiving faster progress payments (and end up paying a substantial price for this oversight). The more prudent course of action is to carve out an exception to any waiver and release documents they sign when there is an outstanding balance or it is contemplated that additional work is to be performed at the time that the lien waiver is signed.