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two-family dwellings who not direct or control the work) liable for injuries resulting from gravity-related occurrences, due to any failure to provide scaffolding, ladders and other safety devices. Insurers, and those who pay their premiums, abhor this statute, because the injured plaintiff's "comparative negligence" will not be considered by the jury, except if it was the "sole proximate cause" of the injury-producing occurrence.

Labor Law § 241(6) requires all areas in which construction, excavation or demolition work is being performed to be "constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

The primary present-day importance of the Industrial Code is that, under Labor Law § 241(6), the touchstone of liability is that the defendant have violated one of its specific, "concrete" provisions, i.e., one not merely related to general safety standards.

One does see OSHA violations alleged in personal injury lawsuits, both as violations of Labor Law § 241(6), and as independent causes of action. Such allegations are routinely rejected. OSHA violations may come into evidence as indicative of negligence, but the fact that conduct violating OSHA caused, or contributed to, the plaintiff's injuries does not establish negligence per se (even if the violation was cited by OSHA, and the citation was not contested, or was upheld). There is no private right of action under OSHA. An employee aggrieved by his employer's violation of any OSHA standard is to report the violation to OSHA's area office, which should trigger an inspection.

A major difference between OSHA and New York statutory and common-law liability is that OSHA focuses on the employment relationship, whereas liability under the Labor Law extends to injuries to "persons lawfully frequenting" the workplace. Also, the owner of a construction site (other than the owner of a one or two-family dwelling who contracts for, but does not direct or control the work) may be liable for damages sustained by an injured worker, if it had the right to control the conduct of the injury-producing work, or actual or constructive notice of the dangerous condition at issue. Under OSHA, generally the owner will not be liable, at least if it did not have its own employees who caused, or were exposed to, the hazard.

Overall, as one New York judge observed, "the system used by OSHA to promote safety consists of inspections of worksites and citations and penalties conferred upon the employer," but "New York law relies upon the threat of private lawsuit for damages brought by the injured workman to motivate the owner or contractor.

While OSHA violations, therefore, have but limited relevance to personal injury actions brought by injured construction employees, an employer's conscientious compliance with OSHA'S construction standards will minimize, although it cannot totally eliminate, the prospect of injuries serious enough to result in a lawsuit.

Scan this code with your Smart Phone to learn more about Thomas H. Welby

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ATTORNEYS AT LAW
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W E L C O M E

MESSAGE TO OUR READERS

Thank you for reading the Fall 2014 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 feature articles contributed by our Partners. Thomas H. Welby discusses OSHA's Place in the Realm of Workplace Safety Law in New York; Thomas S. Tripodianos answers the question about Employee Breach of Non-Compete Agreements. For articles like these, visit our website at www.wbgllp.com or scan this QR code with your smartphone.

Employee Breach of Non-Compete Agreement

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

Question. Does an employer have a claim that employee breached the non-compete agreement based upon nothing more than an allegation that Employee is working for a competitor?

Answer. Yes.

Building Supply Company, alleges that its former Employee, breached a non-compete agreement when he began working for Building Supply Company's Competitor. Whether the non-compete agreement at issue is enforceable will ultimately depend on whether the agreement is "reasonable." This requires a fact-intensive analysis however, by alleging that Employee is working for Building Supply Company's competitor, Building Supply Company has adequately stated a claim that Employee breached the non-compete agreement.

Building Supply Company has over eighty locations around the country from which it is engaged in the business of selling, marketing and installing a wide range of building products, including, but not limited to: wall insulation; attic insulation; spray fiberglass; spray foam; masonry insulation; seamless gutters and leaf protection; metal roofs; soffit and fascia; vinyl shutters, shower doors and bath hardware; shelving and mirrors; custom closets; garage doors; acoustical ceilings; fireplaces and firestopping.

In November 2010, as a term and condition of his continued employment with Building Supply Company, Employee signed the non-compete agreement that is central to the parties' dispute in this case. As consideration for $12,500.01, paid in three annual installments, Employee agreed to a number of terms, including, as is relevant to the present dispute, the following:

First, an "acknowledgment" by Employee that during his employment with Building Supply Company he had "been given, and will continue to be given, training in the Company's methodologies as well as access to certain confidential and proprietary information concerning the business and financial affairs of the Company…which constitutes trade secrets under state law, as well as certain other confidential and proprietary information concerning the business and financial affairs of the Company and its Affiliates that may not constitute trade secrets under state law, but are nonetheless confidential."

Second, for two years following Employee's departure from Building Supply Company and within a 100-mile radius of Building Supply Company's two specified locations, Employee agreed to not "directly or through others, engage or invest in the business of selling, marketing or installing the building products sold, marketed or installed by" Building Supply Company.. (The overlapping 100-mile radii shut Employee out of most of Western New York, a large portion of Northwestern Pennsylvania, and the Northeastern area of Ohio.) The agreement provides that Employee may not "solicit, call upon, or initiate communication or contact with any customer or prospective customer of Building Supply Company…with whom Employee had contact during the last twelve months of Employee's employment, with a view to selling, marketing or installing any service or product that is sold, marketed or installed by Building Supply Company." It further provides that Employee may not "attempt to divert any customer, supplies or vendor of" Building Supply Company from doing business with Building Supply Company. The agreement also prohibits Employee, during the restrictive period, from "inducing or attempting to induce" Building Supply Company's employees to leave Building Supply Company.

Third, Employee agreed not to "disclose any of Building Supply Company's Confidential Information" and not to "use any of the Confidential Information for Employee's own purposes or benefit or for the purposes or benefit of any third party". The agreement defines "Confidential Information" to include "information concerning the financial affairs of Building Supply Company," as well as "information concerning…product specifications, processes, past, current and planned manufacturing, distribution, sales and installation methods and processes, customer lists, current and anticipated customer requirements, price lists and pricing information, market studies, business plans, computer software and database technologies, the names and backgrounds of key personnel, and any other similar information…whether or not a trade secret under the state trade secret law."

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In December 2011, about a year after Employee signed the non-compete agreement, Building Supply Company closed one location, and Employee returned to Building Supply Company's original location where he became the "Insulation and Gutter Foreman and a Residential and Commercial Salesperson." In this role, Employee was the highest-ranking Building Supply Company employee at that location. However, slightly less than two years later, in September 2013, Building Supply Company terminated Employee's employment "because of unsatisfactory performance, including, but not limited to, selling work to one of Building Supply Company's customers at a below-market rate to Building Supply Company's detriment.". Less than one month after his termination, "Employee began employment with Building Supply Company's direct competitor, Competitor

The parties disagree about the nature of Employee's activities after he began his employment with Competitor. Nonetheless, Building Supply Company alleges that after his employment with Building Supply Company was terminated, Employee "will attempt to solicit customers of Building Supply Company with whom he had contact during his last twelve months of employment at Building Supply Company; that Employee "will attempt to induce employees of Building Supply Company" to leave Building Supply Company; and that Employee "is using Building Supply Company's confidential information to gain an unfair advantage, and has in his possession or control confidential information which belongs to Building Supply Company." Based on these beliefs, Building Supply Company sent Employee a letter "requesting that he cease and desist from further violating the noncompete agreement." However, Building Supply Company claims that "Employee has failed or refused to comply with Building Supply Company's request."

Building Supply Company raises six claims: (1) a claim for breach of contract against Employee; (2) a claim for misappropriation of trade secrets against Employee; (3) a claim for breach of the duty of loyalty against Employee; (4) a claim of tortious interference against Competitor as to Building Supply Company's "business and contractual relationships with its existing customers, suppliers, vendors, and employees"; (5) a claim of tortious interference against Competitor as to Building Supply Company's non-compete agreement with Employee; and (6) a claim of unjust enrichment against Employee and Competitor.

The heart of the Building Supply Company's complaint is its allegation that, by working for Competitor, Employee breached the non-compete agreement he signed with Building Supply Company. As discussed below, New York courts limit the extent to which non-compete agreements are enforceable. However, New York courts have not held that non-compete agreements are per se unenforceable. Instead, a non-compete agreement's enforceability generally turns on the fact-laden question of whether the agreement is "reasonable." We do not have enough facts to determine that the non-compete agreement at issue is unenforceable. However, Building Supply Company's allegations are sufficient to state a cause of action against Employee for breach of the non-compete agreement.

In New York, "agreements that restrict an employee from competing with his or her employer upon termination of employment are judicially disfavored because powerful considerations of public policy militate against sanctioning the loss of a person's livelihood. However, despite New York's generally hostile attitude towards them, non-compete agreements may be enforceable, to at least some degree, when they are properly tailored to address legitimate business concerns. In other words, naked restraints are not enforceable, but restraints that are ancillary to a legitimate business purpose may be.

The New York Court of Appeals put this "reasonableness" standard into more concrete terms by holding that a non-compete agreement is reasonable "only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." [citations omitted] Further, even if a non-compete agreement is reasonable in light of each of the three factors set forth above, a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area. Finally, New York law limits non-compete agreements in one other significant way. With respect to the first prong — i.e., whether the restraint "is no greater than is required for the protection of the legitimate interest of the employer — the New York Court of Appeals has limited the cognizable employer interests… to the protection 1 against misappropriation of the employer's trade secrets, or 2 of confidential customer lists, or 3 protection from competition by a former employer whose services are unique or extraordinary." [citations omitted] If the non-compete agreement does not tie its restraint of the employee's activities to one of these three purposes, it is an unenforceable naked restraint on commerce.

The Employee argues that even if the non-compete agreement is enforceable, the Building Supply Company's complaint is nonetheless insufficient as the key allegations relating to the non- compete agreement are all made "upon information and belief." A complaint is not inadequate simply because it contains allegations made upon information and belief. Rather, a complaint may contain information and belief allegations and still be sufficient when the belief is based on factual information that makes the inference of culpability plausible. In other words, a complaint's information and belief allegations may be sufficient to state a claim when the complaint also contains factual content that allows the court to draw the reasonable inference that the Employee is liable for the misconduct alleged.

In this case, the complaint's only factual allegation that Employee is violating the non-compete agreement is its claim that on or about October 15, 2013, Building Supply Company learned that, following his separation from employment with Building Supply Company, Employee began employment with Building Supply Company's direct competitor, Competitor. However, taking this allegation, together with the complaint's description of Competitor as being in the business of selling and installing a wide range of building products, including insulation and assuming that both allegations are true — the reasonable inference may be drawn that that Employee is violating the non-compete agreement, which prevents him from "engaging or investing in the business of selling, marketing or installing the building products sold, marketed or installed by" Building Supply Company.

The Building Supply Company's Remaining Claims

Misappropriation Of Trade Secrets To state a claim for misappropriation of trade secrets under New York law, the Building Supply Company must allege (1) that it possessed a trade secret, and (2) that the Employees used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means.

Duty of Loyalty Employees, as agents of their employers, must act in accordance with the highest and truest principles of morality and, as fiduciaries, are forbidden from engaging in many forms of conduct permissible in a workaday world for those acting at arm's length. Accordingly, an employee owes his or her employer undivided and unqualified loyalty and may not act in any manner contrary to the interests of the employer.

Tortious Interference The New York Court of Appeals has established two lines of analysis for tortious interference claims. The applicable standard depends on the nature of the plaintiff's enforceable legal rights.

First, in cases in which there is an existing, enforceable contract and a Employee's deliberate interference results in a breach of that contract, a plaintiff may recover for tortious interference with contractual relations even if the Employee was engaged in lawful behavior.

Where there has been no breach of an existing contract, but only interference with prospective contract rights, the Court of Appeals has established a higher standard to state a cause of action. In such cases, the plaintiff must show more culpable conduct on the part of the Employee. In the absence of conduct whose sole purpose is to inflict intentional harm on plaintiff, the only wrongful or culpable conduct that will support a claim for tortious interference with business relations are acts that would be criminal or independently tortious such as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone

To state a claim for tortious interference with contract, the Building Supply Company must plead "(1) the existence of a valid contract between the plaintiff and a third party; (2) the Employee's knowledge of the contract; (3) the Employee's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom.

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Unjust Enrichment As the New York Court of Appeals recently noted, unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the Employee has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the Employee to the plaintiff. Typical cases are those in which the Employee, though guilty of no wrongdoing, has received money to which he or she is not entitled. To prevail on a claim for unjust enrichment, a plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.

For the same reasons that one may infer that Employee is violating the non-compete agreement, one may also conclude that the Building Supply Company has stated a cause of action for the remaining claims.

To learn more about Thomas S. Tripodianos, scan this QR code with your smartphone

OSHA'S PLACE IN THE REALM OF WORKPLACE SAFETY LAW IN NEW YORK

By: Thomas H. Welby, P.E., Esq.

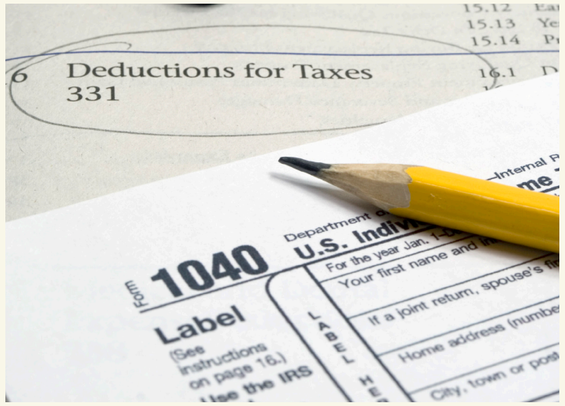
Thomas H. Welby

From time to time, I am asked whether violating OSHA makes the employer liable in a personal injury action — or, more generally, how OSHA fits into the framework of statutory and case law provisions designed to safeguard the health and safety of construction workers, and to give workers redress for injuries suffered on construction jobsites.

Broadly speaking, in New York there are four schemes, whereby federal and state laws endeavor to safeguard workers, and provide injured workers with compensation:

a. Federal OSHA (the OSH Act, and the agency that enforces it);
b. The New York State Industrial Code, and activities of the New York State Department of Labor;
c. Workers' Compensation; and
d. Personal injury litigation, under the common law, and N.Y. Labor Law §§ 200, 240, and 241(6).

Additional facets of worker protection, having limited relevance to construction activities, will be mentioned only in passing. One is that mine safety (mining is more widespread in New York than you might think) comes not under the OSH Act, but under the Mine Safety & Health Act of 1977. Both the United States and New York Departments of Labor have agencies known as the "Mine Safety & Health Administration." The federal MSHA enforces the Mine Safety & Health Act, while the New York MSHA concentrates on safety and health training programs. There also exist a Federal Employers' Liability Act, and a Federal Railroad Safety Act as well.



As in New Jersey and Connecticut, New York's state and local municipal employees are outside the protection of OSHA. In New York, they come under the care of the Public Employee Safety & Health Bureau, part of the State Department of Labor.

Also, while liability insurance (as distinguished from Workers' Compensation) is not a statutory or administrative program, to the extent that it is, in practice, mandated on many construction projects, such coverage provides resources potentially available to compensate injured workers.

While many states comply with the federal OSH Act through state-administered, "Little OSHA" agencies, in New York, New Jersey and Connecticut, most private-sector employment is overseen by federal OSHA.

The NYS Industrial Code, and construction safety-related activities of the NYS Department of Labor, occupy a Zone straddling the boundary between preventative and compensatory aspects of New York's employee safety environment. The Industrial Code was, before OSHA, a primary source of protection for New York workers. OSHA was enacted with a "savings clause," and does not wholly pre-empt the Industrial Code. Since the advent of OSHA, however, updates and amendments to the Industrial Code have been infrequent. The NYS Department of Labor continues to carry out safety-related inspection and enforcement activities, but — except in the domain of State and municipal employment — generally the NYSDOL's efforts in this area are modest, and confined largely to specialized issues, crane safety being one noteworthy example.

Workers' Compensation, of course, was an early-20th century reform. Its primary features are that virtually all employers are mandated to maintain workers' comp coverage, and it provides relatively speedy (albeit limited) compensation, on a "no fault" basis, to injured employees.

Personal injury lawsuits in which injured construction workers are plaintiffs are generally based on common-law negligence, and one or more of Sections 200, 240, and/or 241(6) of the Labor Law. Section 200 is essentially a codification of common-law principles, requiring places of employment to be "so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." It provides further that "all machinery, equipment, and devices . . . be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

Labor Law § 240 is the notorious "Scaffold Law," making both contractors and premises owners (excepting owners of one- and

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