WELBY, BRADY & GREENBLATT, LLP
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WELCOME

Message to our Readers

Thank you for reading the Fall 2016 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 Associates. Michael I. Silverstein discusses Failure to Comply with Statutory Service Requirements Costs Contractor his Mechanic's Lien; Jared A. Hand shares What Constitutes an "Undertaking Under Lien Law Section 5; and Kriton A. Pantelidis provides insight into Understanding Misconduct Proceedings against Professional Engineers.

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Failure To Comply With Statutory Service Requirements Costs Contractor His Mechanic's Lien

By: Michael I. Silverstein, Associate

Michael I. Silverstein

The requirements for serving a Notice of Mechanic's Lien are straightforward:

Within five days before or thirty days after filing the notice of lien, the lienor shall serve a copy of such notice upon the owner, if a natural person, (a) by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or (b) by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or (c) by registered or certified mail addressed to his last known place of residence *** if the owner be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business *** Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien

(Lien Law, §11). However, as simple as they are, these service requirements are also strictly construed by our courts. For example, in *EK Mt Kisco, LLC v Arcon Const. Group*, Inc., 138 A.D.3d 1118 (2d Dept. 2016), an owner commenced a proceeding pursuant to Lien Law § 19(6) to

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summarily discharge a mechanic's lien, based on improper service. The Appellate Division affirmed the lower court's decision to grant the owner's petition, discharging the mechanic's lien, because:

> the appellant failed to demonstrate that it complied with the requirements of Lien Law § 11, since its affidavit of service of the notice of the mechanic's lien did not demonstrate that the notice was sent to the last known place of business of the petitioner EK Mt Kisco, LLC

(Id., at 138 A.D.3d 1119). Here, as the lienor had specific knowledge of that last known address, its service at a different address was fatal to its lien, even though that other address had been specifically provided for in the contract.

Indeed, one of the cases cited by the Appellate Division in *EK Mt Kisco, LLC*, demonstrates just how strictly courts will enforce these service requirements. In *Thompson Bros. Pile Corp. v. Rosenblum*, infra, a contractor who performed work on the home of an individual owner filed a mechanic's lien and the home owner later moved to dismiss the lien foreclosure action. The trial court denied the home owner's motion, stating: "In the instant matter, the Court finds that the notice of lien was served at the address provided by Jeffrey M. Rosenblum, for all purposes under the contract" (2012 WL 11980655 [N.Y.Sup. Nassau]). In reversing the trial court, the Appellate Division noted that:

> However, the plaintiff's affidavit of service of the mechanic's lien demonstrates that the plaintiff failed to serve the notice of the mechanic's lien in compliance with Lien Law § 11, as the notice was not sent to the defendants' last known place of residence. As strict compliance with the statutory requirements is mandated and the courts do not have discretion to excuse noncompliance (see *Matter of HMB Acquisition Corp. v. F & K Supply*, 209 A.D.2d 412, 618 N.Y.S.2d 422; *146 W. 45th St. Corp. v. McNally*, 188 A.D.2d 410, 591 N.Y.S.2d 402), the Supreme Court should have granted that branch of the defendants' motion which was pursuant to Lien Law § 11 to dismiss the sixth cause of action, which was to foreclose a mechanic's lien

(*Thompson Bros. Pile Corp. v Rosenblum*, 121 A.D.3d 672, 674 [2d Dept. 2014]). So, even where a lienor serves its notice of mechanic's lien upon an owner at an address designated by that owner in a construction contract, if the lienor does not satisfy the service requirements of Lien Law §11, the lienor is at risk of losing his lien for improper service.

Scan here to learn more about Michael I. Silverstein

Understanding Misconduct Proceedings Against Professional Engineers

By: Kriton A. Pantelidis, Associate

Kriton A. Pantelidis

Engineers, as licensed professionals pursuant to the New York State Education Law (hereinafter "Educ. Law"), must comply with a rigorous code of professional ethics. These rules and the definition of professional misconduct are set forth in the Educ. Law and by the rules promulgated by the New York State Board of Regents (hereinafter "Board of Regents"). (N.Y. Educ. Law § 6509 and 8 NYCRR §§ 29.1 and 29.3).

While the vast majority of engineers take their responsibilities extremely seriously, and many complaints brought are simply frivolous, all engineers should understand the process involved in responding to an investigation by the New York State Education Department (hereinafter "Educ. Dep't.").

Complaints made to the Educ. Dep't. are investigated by a professional conduct officer. In the instance the complaint involves a question of professional expertise, the officer may, but is not required to, consult with a panel of three members of the State Board for Engineering, Land Surveying and Geology (hereinafter the "Board of Engineering"), which was created to assist with "matters of professional licensing, practice, and conduct." (N.Y. Educ. Law § 6508). The investigation may be as simple as requesting certain documents or may involve a more in-depth process involving all the project documents and in-person meetings.

After his review, the professional conduct officer has two

options: 1) He may terminate the proceeding because substantial evidence is lacking or 2) he may determine – after consulting with a professional member of the Board of Engineering – that substantial evidence exists in support of the complaint. (N.Y. Educ. Law § 6510(1)(b)). If the matter moves forward, it will involve either expedited procedures or adversary proceedings. (N.Y. Educ. Law § 6510(3) and 8 NYCRR §17.3). Both processes are discussed below.

Expedited Procedures

Minor or technical violations may be resolved by what are known as expedited procedures. (N.Y. Educ. Law § 6510(2)(a)). Some examples that qualify for expedited procedures include: "isolated instances of violations concerning professional advertising or record keeping, and other isolated violations which do not directly affect or impair the public health, welfare or safety."

The professional conduct officer, with the advice of a member of the Board of Engineering, has the discretion to determine whether a violation is minor or technical. If it is determined that a violation exists, but is minor, the professional conduct officer (after consulting with a member of the Board of Engineering) may issue an administrative warning or prepare and serve formal charges. If the latter option is chosen, a violations panel will schedule a meeting with the engineer. Thereafter, the panel may issue a censure and reprimand and/or may impose a fine not to exceed five hundred dollars for each instance of minor or technical misconduct.

Adversary Proceedings

In the instance a complaint is not terminated for lack of substantial evidence or resolved by way expedited procedures, disciplinary proceedings will continue and the engineer will be subject to adversary proceedings. (N.Y. Educ. Law § 6510(3)).

The Hearing

The initial step once adversary proceedings are initiated is a hearing, similar to a trial, before a panel of at least three individuals, two of which must be members of the Board of Engineering. At the hearing, the design professional (or his counsel) can (among other things): produce witnesses and evidence in his defense; cross-examine adverse witnesses; and examine adverse evidence. (N.Y. Educ. Law § 6510(3)(a)). Importantly, the hearing panel is not bound by the rules of evidence and a guilty verdict requires only a preponderance (i.e., 51%) of the evidence. (N.Y. Educ. Law § 6510(3)(c)).

After the completion of the hearing, the panel issues a written report with findings of fact, a ruling on each charge (a guilty verdict requires at least two votes), and a recommended penalty in the instance of a guilty verdict. (N.Y. Educ. Law § 6510(3)(d)).

Review of the Regents Committee

The report of the hearing is reviewed by a three person "Regents Review Committee" appointed by the Board of Regents. (N.Y. Educ. Law § 6510(4)(a)). This committee acts similar to an intermediate appellate court and will schedule a meeting to discuss the findings of the hearing. Thereafter, the Review Committee will prepare their own report and forward it to the Board of Regents. (N.Y. Educ. Law § 6510(4)(b)).

Decision of the Board of Regents

Once the Board of Regents receives the report of the Regents Review Committee, it evaluates all the prior evidence, proceedings, and rulings and issues a final order. (N.Y. Educ. Law § 6510(4)(c)).

The penalties which can be imposed include but are not limited to: censure and reprimand; suspension, revocation, or annulment of the engineer's license; and a fine not to exceed ten thousand dollars per guilty charge. (N.Y. Educ.

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Law § 6511).

Conclusion

While many complaints are meritless, the disciplinary process detailed above can be involved and serious. If a complaint is filed with the Educ. Dep't., all engineers should engage legal counsel in order to understand the full scope of the ramifications and to chart out an appropriate course in responding to the Educ. Dep't. Ideally, counsel should be retained prior to any substantive communications with the Educ. Dep't.

Scan here to learn more about Kriton A. Pantelidis

What Constitutes an "Undertaking" Under Lien Law Section 5

By: Jared A. Hand, Associate

Jared A. Hand

A recent decision surrounding the highly publicized and litigated project known as B2, a 34-story modular building containing 350 residential units, provides an opportunity to interpret the language of Lien Law § 5, which states that a private developer on public land must post a bond *or other undertaking* guaranteeing prompt payment to a contractor.

In furtherance of the project, Skanska USA Bldg. Inc. ("Skanska") and Atlantic Yards B2 Owner, LLC ("B2 Owner") entered into a "Construction Management and Fabrication Services Agreement" (the "CM Agreement"). After terminating the CM Agreement via a 146-page letter, Skanska commenced suit against, among others, B2 Owner and its parent company, Forest City Ratner Companies, LLC ("Forest City"). In relevant part, Skanska alleges that B2 Owner and/or Forest City (the private developer) breached the CM Agreement by failing to post a bond (pursuant to Lien Law § 5) to guarantee B2 Owner's performance under the CM Agreement. In response, B2 Owner and Forest City moved to dismiss.

The lower court granted the motion to dismiss. On appeal, the Appellate Division, First Department, affirmed the ruling. In affirming, the Appellate Division undertook an analysis of the guarantee provided by a Forest City affiliate, and the following language contained in Lien Law § 5:

> Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of *the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys* due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement.

The Appellate Division rejected Skanska's argument that the guarantee provided by an affiliate of Forest City did not comply with the law because it is not equivalent to a bond "or other form of undertaking". The guarantee stated that B2 Owner would "cause Substantial Completion of the Improvements and perform the Development Work," including "to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work, including, but not limited to, the costs of construction, equipping and furnishing the Guaranteed Work".

The Appellate Division stated that the guarantee provided follows the letter of the statute in that it guarantees prompt payment to contractors. The fact that alternative or seemingly better "undertakings" may have been available, such as a letter of credit (as the dissent notes), is irrelevant. The public owner, Empire State Development Corporation, was satisfied with the guarantee, as was the Appellate Division. It should be noted that the Appellate Division did not address Skanska's ability to enforce the guarantee as a third-party beneficiary, thereby leaving open the question of proper pursuit of the undertaking.

While this case provides an interesting analysis and decision with regard to compliance with Lien Law § 5, the waters remain murky as to what type of "undertaking" will actually satisfy the statute. Given that two of the Appellate Division Judges provided a dissenting opinion, Skanska has the right to appeal to the highest court in the State, the New York Court of Appeals. Thus, please stay tuned for further developments with regard to the interpretation of Lien Law § 5.

Scan here to learn more about Jared A. Hand