Welby, Brady & Greenblatt, LLP

Construction Report

Published December, 2018 Issue 31

WELCOME

Message to our Readers

Thank you for reading the 31st 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 Legal Alerts written by our staff. Thomas S. Tripodianos, Partner, answer the question, Are contractually shortened limitations periods to commence an action for breach of contract enforceable?; Frank Gramarossa, Esq., Associate, discusses the topic of correctly filed liens; and Gregory J. Spaun, Partner, explains Knowledge of Contrary Facts Negates Effect of Estoppel Certificate.

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KNOWLEDGE OF CONTRARY FACTS NEGATES EFFECT OF ESTOPPEL CERTIFICATE

By: Gregory J. Spaun, Partner

Gregory J. Spaun

Regardless of whether you are in the construction business, the financial industry, or are a brick-and-mortar retailer, chances are that if you own a business, you have a commercial landlord for one or more of your business locations. In the commercial real estate business, landlords who undertake certain transactions, such as refinancing or selling the leased property, often require tenants to sign estoppel certificates. Estoppel is an equitable concept that prevents a party from doing something that he or she otherwise has every legal right to do because of a promise, a representation, or some other reason. Estoppel certificates are meant to provide the financier, purchaser, or other party to the landlord's transaction with assurances that there are no defaults or other problems under the tenant's lease, and that the tenant has no claims against, or issues with, the landlord. Accordingly, in the context of an estoppel certificate, when signed by the tenant, they "estop", or prevent the tenant from later raising a claim against the landlord that was not specifically disclosed in the certificate. In the case of *Aerotek, Inc. v 757 3rd Avenue Associates, LLC*, argued by this author, an appellate court declined to enforce an estoppel certificate, notwithstanding that it was signed by the tenant.

In *Areotek*, the leases at issue provided that Areotek (and a sister-entity) were entitled to be reimbursed for certain tenant improvement allowances by the landlord. Areotek submitted initial documentation in support of its request for reimbursement of the tenant improvement allowances in August of 2014, and it followed up with final documentation (which included final lien releases from its contractors and suppliers) on December 4, 2014. Two months later, the landlord executed an agreement to sell the building in which Areotek was a tenant, and it represented to the buyer its belief that Areotek was no longer entitled to be reimbursed for the tenant improvements. In order to close its sale, the selling landlord asked Areotek to sign an estoppel certificate

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stating that Areotek had "no further rights to receive any allowances or Landlord contributions for tenant improvements pursuant to the terms and conditions of the Lease", which it did. After the sale closed, the landlord refused to reimburse Areotek for the tenant improvement allowances, and Areotek sued.

In response to the lawsuit, the landlord made a motion to dismiss, citing to the estoppel certificate and the language stating that Areotek had no further rights to receive the allowances. In opposition, Areotek argued that estoppel, as an equitable construct, required the party claiming the doctrine (here, the landlord) to have "clean hands", and that this landlord did not have clean hands because it accepted the certificate with knowledge of a contrary—and true—state of facts. The trial court denied the motion on that ground, and an appeal was taken. On the appeal, this author argued that Areotek took no action to suggest that they were withdrawing their reimbursement request, or that they were willing to forgo payment, and that the landlord therefore had no grounds to believe that the facts stated in the estoppel certificate were actually true. The Appellate Division affirmed, finding that the allegations were clear that the landlord accepted the estoppel certificates "with knowledge of the contrary, and true, state of the facts", and that without "action to suggest that [Areotek was] withdrawing their reimbursement request or that they were willing to forgo payment", the landlord could not rely on those estoppel certificates to bar Areotek's claim.

While the tenant ultimately prevailed against the motion to dismiss its lawsuit, the fact of the signed estoppel certificates was hard to overcome. The outcome of the case rested on equitable grounds of "clean hands", the doctrine that one who seeks to invoke equity must have behaved equitably itself. As the court ruled here, a landlord with knowledge that the facts recited in the estoppel certificate are not true, and with knowledge that contrary facts are true, cannot invoke the equitable remedy. However, as equity is a relative concept that is applied in each case, a tenant who is asked to sign such a certificate would be well advised to consider the effect of signing such a certificate, and to consult with competent counsel in order to help weigh the effects of such a signature. Or else, in a less clear cut case, the certificate may be enforced to your detriment.

Scan here to learn more about Gregory J. Spaun

ARE CONTRACTUALLY SHORTENED LIMITATIONS PERIODS TO COMMENCE AN ACTION FOR BREACH OF CONTRACT ENFORCEABLE?

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

At least in New York's First and Second Departments; maybe not. In recent cases on the subject, General Contractor, hired Subcontractor to provide security services at several different construction sites, pursuant to separate subcontracts. Each subcontract involved a public construction project. The subcontracts were identical, and contained the following relevant provision:

> "Article 33 - CLAIMS AND DISPUTE RESOLUTION
> Paragraph 33.5 Limitation on Suit
> "No claim or action by [Subcontractor] arising out of or related to th[e] [contract] shall lie or be maintained against [General Contractor] unless such action is commenced no later than six (6) months after either: [a] the cause of action accrued, [b] the termination or conclusion of th[e] [contract], or [c] the last day [Subcontractor] performed any physical work at the [project site], whichever of the proceeding [sic] events shall occur first."

Both the Subcontractor and General Contractor were named as defendants in a class action under New York's prevailing wage statute commenced by present and former employees of Subcontractor (the Wage Action). In a letter, counsel for Subcontractor informed counsel for General Contractor that it considered the Wage Action to be frivolous, and that Subcontractor intended to move for summary judgment dismissing it. In the same letter, however, Subcontractor asserted that $232,213.13 was due and owing to it for its work under the subcontracts, and demanded payment of same. In a responsive letter, counsel for General Contractor informed counsel for Subcontractor that General Contractor was relying upon an indemnity provision in the subcontracts that entitled it to withhold money due and owing to Subcontractor, pending the outcome of the Wage Action, stating that

> "[w]hile it may be ultimately determined that the [Wage Action] Plaintiffs' claims are frivolous and/or without merit, be advised that General Contractor will continue to enforce the indemnity provisions contained in the contracts with your client until such determination is made by the Court [in the Wage Action]."

The letter further noted that, in connection with one of the jobs, payment was not yet due, since the public owner had not yet approved a change order. Subcontractor did move for

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summary judgment in the Wage Action. However, after the summary judgment motion was denied, and the Wage Action became protracted, it decided it could no longer wait to be paid. Accordingly, it commenced an action to collect its alleged balance due.

General Contractor argued that the action was time-barred by the contractual limitations provision, which required Subcontractor to commence suit within six months of the last time it performed physical work under any of the subcontracts. General Contractor asserted that, in accordance with the limitations clause, this was the earliest of the three possible dates for measuring the time to commence suit, the others being the "accrual date," and termination of the subcontracts.

Subcontractor asserted that General Contractor had been paid in full by the public owner on all four of the projects for which it provided security services, wherefore General Contractor could not rely on certain provisions in the subcontracts making Subcontractor's right to payment contingent on payment to General Contractor by the owners. Subcontractor argued that the contractual limitations period did not bar the claim because General Contractor, pursuant to General Municipal Law section 106–b(2), (which requires a contractor who receives any payment from a public owner to make prompt payment to its subcontractors for their work), imposed upon it a continuing and ongoing obligation to pay Subcontractor. Subcontractor also relied on the letter from General Contractor's counsel, claiming that it constituted an acknowledgment of the debt, as contemplated by General Obligations Law section 17–101, thus defeating any statute of limitations claim.

In reply, General Contractor asserted that the public owner was either retaining funds in connection with the Wage Action or that the General Contractor, while acknowledging it had been paid, was holding the money, in case it was later determined that Subcontractor had to indemnify it as the result of an adverse judgment in the Wage Action.

The Subcontractor's argument in the case that went up on appeal to the First Department was that the contractual limitations provision was unenforceable, because it permitted a scenario in which, even though a claim had not accrued by the time six months had passed since the last time physical work was performed, it was still time-barred. Subcontractor argued essentially that, in light of General Contractor's stated position that payment was not due to Subcontractor until such time as the Wage Action was resolved, Subcontractor should not have been subjected to the "catch–22" of having to file a lawsuit to toll the statute of limitations, where the claim was not yet ripe for adjudication.

General Contractor noted that Subcontractor demanded payment from General Contractor in its counsel's letter, which was still within the six-month limitations period. It characterized this as an acknowledgment by Subcontractor that it had a ripe claim. However, in its counsel's response, General Contractor explicitly rejected the claim as premature. Accordingly, Subcontractor rightfully saw filing a lawsuit at the time as a futile gesture.

A recent Second Department case further undermines General Contractor 's position. Similarly in that case the subcontractor was owed money pursuant to a subcontract that contained a one-year contractual limitations period, and a provision making payment by the owner to the general contractor a condition precedent to the general contractor's obligation to pay the plaintiff. It took nearly two years for the owner to approve payment to the general contractor, and when the plaintiff sued to recover, the general contractor moved to dismiss, relying on the contractual limitations period. The court refused to dismiss on statute of limitations grounds.

In this First Department case, it was not clear that General Contractor was relying on a specific contractual condition precedent, in advising Subcontractor it would not pay until a favorable resolution of the Wage Action had been reached. Nevertheless, General Contractor made clear that it would not release monies to Subcontractor until the Wage Action was resolved. Accordingly, Subcontractor's argument that the limitations period was rendered ineffectual by General Contractor's position was correct.

Scan here to learn more about Thomas S. Tripodianos

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 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