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Thomas S. Tripodianos

Welby, Brady & Greenblatt, LLP is pleased to announce that Thomas S. Tripodianos, Partner, has been admitted to practice in the State of Connecticut.

Scan this code with your Smart Phone to learn more about Thomas S. Tripodianos

Welby, Brady & Greenblatt, LLP is pleased to announce its new practice area in Commercial Law & Litigation.

The attorneys at Welby, Brady & Greenblatt, LLP have extensive and varied experience in general commercial matters and litigation, providing an array of services. Many businesses face operational issues and varied disputes including ownership and partnership problems, insurance issues, real property taxation, employee issues and contract issues. Welby, Brady & Greenblatt, LLP brings real world experience to the table to assist clients in navigating these issues.

ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM IS NOW EFFECTIVE

Welby, Brady & Greenblatt, LLP is pleased to report that the ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM is now effective. Contact us to find out why this document is important to your business.

Prior to the creation of the Addendum municipalities, state agencies, property owners and general contractors did not have confidence that the limited information provided on the Acord Certificate of Insurance provide adequate assurance of the intended risk transfer. Reading and understanding complicated insurance policies from multiple trades on a single project was simply not a cost effective option. by, Brady & Greenblatt, LLP and a group of other industry stakeholders sought to find an alternative. The group collaborated to craft a form to be used as an addendum to the existing certificate that lists the typical coverages included in the insurance requirements of construction contracts. Moreover, the group will devise educational materials to further assist the industry.

A copy of the ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM can be downloaded at http://wbgllp.com/PDF/ACORD-855-NY.pdf

WB&G ATTORNEYS AT LAW
Welby, Brady & Greenblatt, LLP
New York, New Jersey, Connecticut and New York City
Phone: (914) 428-2100 • Fax: 855-740-2860 • E-mail: info@wbgllp.com • www.wbgllp.com

WELBY, BRADY & GREENBLATT, LLP
ATTORNEYS AT LAW
REPORT
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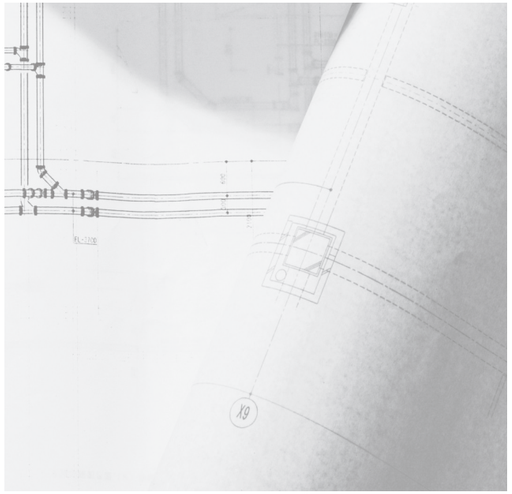
WELCOME

MESSAGE TO OUR READERS

MESSAGE TO OUR READERS

Thank you for reading the Spring 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.

Welby, Brady & Greenblatt, LLP participated in drafting an addendum to ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM that that is now effective; Law Clerk, Rick Ward, with editing assistance by Firm Partner, Thomas S. Tripodianos, shares how Contract Language May Affect the Limitations Period of a Bond; Robert W. Bannon, II, Associate, discusses possible unintended contractor liability: Gregory J. Spaun, recently named Partner at Welby, Brady & Greenblatt, LLP, informs on the potential cost of "Paperwork Breach"; and find new announcements about the Firm on page '3'.



Contract Language May Affect the Limitations Period of a Bond

By: Rick Ward, Law Clerk, 3rd year law student at Pace Law School

Edited by: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

The specific language of a performance bond can cause the limitations period for claims against the bond to run before the full contract amount is paid. In *City of Yonkers v 58A JVD Indus., Ltd.*, the second department found that the performance bond claim accrued when final payment on a contract had been made, even though 1% of the contract price was still unpaid to the contractor. The City's claim was dismissed.

In April of 2007, Yonkers contracted with JVD to perform the concrete and related work for its project, the McLean Avenue Streetscape Improvement Program. The contract required JVD to secure a performance bond in favor of the City, which it executed along with the Colonial Surety Company. The specific language of the bond included a limitation that claims on the bond must be made within two years after the date of Final Payment under the contract. JVD agreed to hold Colonial harmless for any claim arising out of the performance bond.

In October of 2007, the City notified JVD that several loads of concrete supplied for the project fell short of the contractual specifications. Notwithstanding this notification, in October of 2008 the city issued a certification that JVD was entitled to 80% of the retainage on the contract, and paid JVD accordingly. By the terms of the construction agreement this was defined as final payment. The unpaid 20% of the retainage was withheld as security for faithful performance of JVD's obligation pursuant to the terms of the contract. In March of 2009, the City informed JVD that portions of the project had rapidly and prematurely deteriorated and that the contract required JVD to repair, replace, restore or rebuild the affected areas. JVD failed to do so and the City filed a claim with Colonial, which Colonial rejected. In January of 2013, the city commenced an action against JVD and Colonial for breach of contract. JVD, as indemnitor of Colonial, moved to dismiss the action against Colonial on the ground that it was time-barred by the language of the bond.

The Supreme Court of New York initially denied the motion agreeing with the City that the limitations period did not begin to run until payment of the remaining 1% of the contract. However, on appeal, the Second Department reversed that determination. It found that two sections of Article 28 of the contract, when read together, establish that Final Payment under the contract occurred upon the City's certification of the work as complete and tender of payment thereon. It also found that the October 2008 certification and payment indisputably met the contract definition of final payment, even though 1% of the contract price was still retained by the city pursuant to the security provision of the contract. Since the City brought its claim against the Surety more than four years later in January of 2013, the court dismissed the City's claim.

Practice Tip: Contracting parties utilizing performance bonds must pay close attention to the detailed language of the bond and the contract, especially when dealing with time limiting language on a bond that incorporates a term defined by the underlying contract.

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Failure to Obtain a Written Contract & Insurance Before Commencing Work May Subject Contractors to Unintended Liability

By: Robert W. Bannon II, Associate

Robert W. Bannon II

Too often, due to timing constraints, "this is how we do business attitudes" or just bad practice contractors fail to obtain signed contracts, submit written invoices and deliver contractual or statutory notices. Unfortunately, this opens a contractor to unexpected liability. Two recent cases provide an excellent example of how crucial it is to follow proper procedure and document construction projects every step of the way. This is especially important in the context of limiting liability for personal injury claims and obtaining contractual indemnification.

In *DiNovo v. Bat Con, Inc.* (2014 NY.Slip.Op. 02989 [3rd Dept. 2014]) defendant, Bat Con, contracted with the County of Onondaga to perform emergency repairs to a municipal sewer in the Spring of 2008. Bat Con, subsequently, solicited subcontractors to perform a portion of the emergency repair work and accepted a proposal from PGC. PGC immediately began work at the project and in May, 2008 PGC's employee was injured when a drill rig tipped over into an excavation trench. Barred from suing his employer PGC's employee sued Bat Con alleging violations of the New York State Labor Law. Bat Con, in short order, answered and commenced a third-party action seeking contractual indemnification from PGC. Thereafter, PGC moved for summary judgment on the contractual indemnification claims. The trial Court denied summary judgment as to PGC.

At issue, was whether there was an express written agreement between Bat-Con and PGC with an indemnification provision. In support of PGC's motion for summary judgment it was established that the parties had never worked together. Moreover, it was undisputed that PGC's proposal which was submitted and accepted prior to the start of work briefly defined the work to be performed, the price, and other details of the project. The proposal included an attachment containing what PGC's president described as "standard" terms and conditions, including an indemnification provision expressly limiting PGC's responsibility to its own negligence. . It was also undisputed, that after both PGC began work and the alleged accident occurred, Bat Con forwarded a contract to PGC that contained an indemnification provision. PGC acknowledged receipt but maintained that it never accepted or signed the subcontract. Bat Con countered that PGC expressly accepted that contract by both performing the work and obtaining insurance certificates. The Appellate Division, was ultimately unpersuaded, and issued a ruling in favor of PGC dismissing all claims by Bat Con and awarding PGC the costs of the appeal.

Bat-Con failed to provide any evidence that PGC knew of the subcontract or acted in conformity with it... Bat Con is stuck paying the costs of PGC's appeal and the continuing costs and attorneys' fees associated with defending the injured employee's lawsuit.

Properly drafting and executing construction contracts can prevent situations like Bat Con. It is important to ensure that contracts are executed and insurance and indemnification are in place prior to permitting the commencement of any work...

Beware of the "Paperwork Breach"; it Can Prove Costly

By: Gregory J. Spaun, Partner

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Gregory J. Spaun

It is widely acknowledged that record keeping on a modern construction project can often seem as tedious and as difficult as the principal construction itself. Unfortunately, as a result, there are contractors who let paperwork requirements slip, preferring to focus on the construction itself. The mindset is often that building a good product is the best way to avoid litigation. However, the recent decision of the Appellate Division in *High Tech Enterprises & Electrical Services of NY, Inc. v Expert Electrical, Inc.* (113 AD3d 546 [1st Dept 2014]) highlights that a failure to adhere to "paperwork" requirements—even when there are no resulting or related problems—can support a claim for breach of contract and absolve the non-breaching party from the responsibility to pay for work actually performed.

The dispute in *High Tech Enterprises* arises out of a 2006 project for the New York City Department of Parks and Recreation. The Parks Department hired Expert Electrical as its prime contractor for the reconstruction of an electrical substation in Queens. Expert Electrical subcontracted certain work to High Tech, which High Tech performed in mid- to late-2007. High Tech submitted three payment applications to Expert Electrical, only two of which were paid.

During the project, city inspectors had visited the project site. This prompted Expert Electrical to perform an internal audit of its records. During this audit, Expert Electrical determined that High Tech failed to provide proper certified payroll records[1] (the reports provided were not complete and had discrepancies in both the number of hours worked and the wage rate classifications), and that it failed to pay its workers prevailing wage and proper supplemental benefits. As a result, High Tech withheld the third payment—although the work addressed in the third payment application had been accepted by the owner and Expert Electrical had been paid for this work.

As a result of Expert Electrical's failure to pay, High Tech ceased its work, asserted a mechanic's lien and payment bond claim and, ultimately, commenced a lawsuit. Expert Electrical asserted counterclaims seeking to recover the excess completion costs it incurred after High Tech unilaterally suspended its work. In 2012, both parties moved and cross-moved for summary judgment. In support of its cross-motion and in opposition to

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Expert Electrical's motion, High Tech contended that it had, in fact, properly paid its workers, and that this proper payment was best evidenced by the undisputed fact that that in the nearly five years since High Tech ceased its work at the project not a single one of its employees had complained about any alleged failure to pay wages, nor had any administrative agency issued a determination regarding any alleged violation of the prevailing wage statute (Labor Law §220).

In its decision, the trial court found in favor of High Tech. In doing so, the court held that "nothing in the contract may be interpreted as permitting Expert Electrical to withhold earned payment from High Tech, as the result of High Tech's failure to pay prevailing wages, in any circumstances". The Appellate Division reversed, finding that the High Tech's refusal to provide an affidavit stating that all labor and materials had been paid for in full was a material breach of the contract, and that such refusal justified Expert Electrical's failure to pay. The Appellate Division reasoned that the contract made the provision of the documentation a condition precedent to payment, and that since High Tech never provided the required documentation, Expert Electrical's obligation to pay never came into being.

High Tech Enterprises provides a warning to contractors that providing solid paperwork is often just as crucial as performing solid work. If the provision of certain paperwork is specifically set forth in a contract (here, certified payroll reports and affidavits of payment), it can be characterized as a condition precedent to payment. As was demonstrated in *High Tech Enterprises*, upon High Tech's failure to meet the condition precedent in the contract, Expert Electrical's obligation to make payment never arose, despite that: 1) the work was actually performed and accepted and paid for by the owner; and 2) the problem which the paperwork requirement was designed to guard against (here, failing to properly pay employees) never arose.

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[1]Although not clear from either the trial court's or the appellate court's decision, it appears that the discrepancies with the certified payroll documents were only discovered after High Tech had been paid. Inasmuch as the requirement to submit accurate certified payroll documents is statutory, it ostensibly had an independent obligation to bring this to the Parks Department's attention and refund the money it had been paid in reliance on those erroneous documents. It appears that both the trial and appellate court missed the inconsistency in permitting Expert Electrical to receive payment based upon the same incomplete documents that Expert Electrical used to deny High Tech its payment.

Scan this code with your Smart Phone to learn more about Gregory J. Spaun

Firm Announcements:

John J.P. Krol

Welby, Brady & Greenblatt, LLP is pleased to announce John J.P. Krol, Of Counsel, is being installed as the President Elect for the ASCE Lower Hudson Valley Branch.

Scan this code with your Smart Phone to learn more about John J.P. Krol

Gregory J. Spaun

Welby, Brady & Greenblatt, LLP is pleased to announce that Gregory J. Spaun has been named as a Partner at the Firm.

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