Construction Tool Box: Construction Laws, Cases, Notes and Alerts

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INTRODUCTION

Summer is a time for vacations and relaxing, except for the busy construction trades. Cranes, scaffolding and orange cones dot the summer landscape. Like hamburgers, hot dogs, baseball and the beach, this issue addresses old favorites such as the ongoing construction defect/CGL coverage saga, indemnity, Prompt Pay acts, contractual mistake, and statutes of repose, and new twists on CERCLA liability and consequential damages. Attached is our contribution to your late summer reading, hopefully holding a cold one of your choice.

-The Editor
August 2014

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NATIONAL FOCUS

CERCLA LIABILITY

Price Trucking Corp. v. Norampac Industries, Inc., 2014 U.S. App. Lexis 5093 (2d Cir. 2014).

Landowner Norampac Industries, Inc. (Norampac) executed a soil contaminant cleanup project governed by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Norampac hired AAA Environmental, Inc. (AAA) as a general contractor to excavate and remove contaminated soil; AAA subcontracted Price Trucking Corp. (Price) to dispose of the soil. Norampac paid AAA for its services, but AAA failed to pay Price. When it was finished, Price was still owed more than $600,000. Unable to recover from AAA, Price sought recovery from Norampac under CERCLA. Price argued that a landowner is not relinquished from liability until all parties who contributed to the cleanup have been paid. The District Court agreed and decided that Price could recover from Norampac under CERCLA.

The Second Circuit reversed. The Court held that, because Norampac already paid AAA in full, it was not responsible for also paying Price, a subcontractor. The Court further held that subcontractors may not recover damages for breach of contract against parties with whom they are not in privity.

NATIONAL FOCUS

FALSE CLAIMS ACT – ORIGINAL SOURCE OF INFORMATION

U.S. ex rel. Rusty Fryberger v. Kiewit Pacific Co., 2014 U.S. Dist. LEXIS 67165 (N.D. California, May 14, 2014).

Generally, the False Claims Act and similar state statutes do not permit claims by those who are not "original sources of information" regarding alleged fraud. If the information is readily known or publicly available, a claimant is not allowed to be rewarded on a claim. In this case, the relators argued that Kiewit made false claims to the government for payment with respect to the installation of mechanically stabilized earth walls on a highway project. The relators presented the results of an investigation to the government prior to filing their action in May 2012.

Under the FCA, suit is barred when the person bringing the action is not the original source of the information, if for example, the information is disclosed by other people or sources. In this case, the relators conceded that there had been some news reports about the problems with the earth work that had been publicly reported, but claimed that their investigation provided significant new and additional information about the problem.

Kiewit argued that the additional information presented by the relators did not materially add to the public disclosures or government information, but the court allowed the claim to proceed ruling that the investigation by these plaintiffs augmented information obtained from the media as well as other available information to the government. The court held that at least for pleading purposes the plaintiffs were sufficient original sources of information obtained directly and independently so as to allow the claim to overcome a motion to dismiss.

NATIONAL FOCUS

FEDERAL PROMPT PAYMENT LAW PRE-EMPTS STATE LAW

The Erection Co. v. Archer Western Contractors, LLC, 2014 U.S. Dist. LEXIS 36180 (D. Nev. March 17, 2014).

Archer Western Contractors was general contractor on a FAA project to build a new control tower at Las Vegas McCarran International Airport. The steel fabrication subcontractor, Postel Industries, Inc. (Postel), hired The Erection Company, Inc. (TEC) to perform steel installation. Postel abandoned the project and never paid TEC for its work. TEC stopped working on the project and issued two notices of termination and claimed it was owed over $230,000. Archer filed for breach of contract against TEC. TEC argued that it complied with Nevada's Prompt Payment Act (PPA) when it stopped work. The District Court held that TEC's compliance was irrelevant because the Nevada statute was preempted by conflicting and controlling federal law.

The FAA's Acquisition Management System (AMS) included a "Prompt Payment in Construction Contracts" provision which did not allow funds to become due to a subcontractor until obtained by the payor (higher-tiered contractor).The parties contended Archer had not paid Postel the requisite amounts, therefore TEC was not yet entitled to payment. The AMS also did not grant subcontractors the right to stop work. Although it did not expressly prohibit subcontractors from doing so, the Court reasoned that "such a provision would be contrary to the purpose of the AMS." Therefore, the Court held that Nevada law did not apply under the Supremacy Clause.

NATIONAL FOCUS

GEOTECHNICAL REPORTS

Appeal of: CCI, Inc., 2014 ASBCA No. 57316 (March 14, 2014)

In this case it was decided that a contractor ultimately bore responsibility (pardon the pun) to collect its own geotechnical site information necessary for project design and construction. The case involved a $35 Million differing site condition claim concerning a pier and seawall in Iraq. The RFP for the project stated that the specific geotechnical information necessary to design and construct the pile foundations, seawall and other geotechnical related items shall be the contractor's responsibility. In addition, the contractor failed to show it could not have foreseen soft clay underlying the site. The RFP instructed the contractor to inspect the site and stipulated that the contractor should research all existing conditions at the naval base and waterway.

CALIFORNIA

CONSTRUCTION DEFECT NOT COVERED BY CGL POLICY

Regional Steel Corp. v. Libery Surplus Insurance Corp. 2014 WL 1990094 (Cal. Ct. App., 2d Dist. May 16, 2014).

Regional Steel supplied reinforcing steel for an apartment complex in California and used two different kinds of seismic hooks in the building walls, 90-degree and 135-degree. The city building inspectors eventually required 135-degree hooks exclusively. The owner withheld a $545,000.00 payment to cover

the cost of repairing and replacing the inadequate tie hooks. In litigation with the owner, Regional Steel sought a defense from its insurance company which was declined based on the argument that opening up the concrete to install the correct tie hooks was not "property damage" within the meaning of the policy. Eventually, a trial court held in favor of the insurance company and this was affirmed on appeal.

The appellate court first ruled that the alleged damage occurred outside the policy period since the problem with the tie hooks was discovered in January 2005 and the policy took effect in August 2005. Fundamentally, courts have ruled that installing a defective component into a larger property is not "property damage" unless the component causes some different, additional physical injury. The only allegations against Regional were that it failed to install the proper tie hooks, and its failure to do so would require demolition and repair of certain areas. The court also ruled that a policy exclusion with respect to damages from a deficiency in "your product" or "your work" also applied to bar coverage. The underlying suit arose from deficiencies in Regional Steel's performance of its work, and the policy exclusion applied as well.

CALIFORNIA

CONSTRUCTION DEFECT NOT COVERED DUE TO MATERIAL MISREPRESENTATIONS

Carvale Construction Inc. et al. v. Probuilders Specialty Insurance Company, 2014 WL 2616834 (Cal. Ct. App., 4th Dist. June 12, 2014).

Insurance company rejected a construction defect claim on grounds it was not covered under the policy, and because the insured homebuilder had made material misrepresentations in its insurance application with respect to completed projects, ongoing projects, and gross receipts resulting in payment of lower premiums.

The trial court and appeals court ruled in favor of the insurance company that inaccurate information on the policy application was not truthful, voiding coverage based on breach of contract and also the homebuilder's alleged "unclean hands".

CALIFORNIA

CONTRACTUAL MISTAKE

U.S. f/u/b/o Collins Plumbing, Inc. v. Turner-Penick JV et al, 2014 U.S. Dist. Lexis 42285 (S.D. Cal. March 27, 2014)

General contractor, Turner-Penick JV (T-P), hired California Comfort Systems (CCS) as a subcontractor to install HVAC systems in two dormitories at a military base. Based on its understanding of the contract, CSS installed "through-wall" air conditioning units as opposed to a central air system that was supposedly required. CSS claimed that the contract terms were ambiguous, and sought payment for having to redesign the HVAC systems it installed.

CSS argued that T-P's project director agreed that the "through-wall" system would satisfy the project requirements; the government did not specify that a central air system was required in these

specific dormitories as it had in others. CSS insisted that its subcontracts with T-P contained no provisions requiring a central-air system. T-P contested by claiming that the subcontract mandated compliance with the RFP, the RFPs mandated compliance with the US Department of Defense United Facilities Criteria (UFC), and the UFC required central-air systems.

CSS could not demonstrate ambiguity in the subcontracts, RFP, or UFC. Therefore, the Court held there was no ambiguity, and CSS could not recover the additional cost of the redesign on that basis. The Court denied T-P's motion for partial summary judgment on the issue of whether CSS is entitled to additional compensation for the redesign. The case continues because there was evidence that both CSS and T-P were both mutually mistaken, and it may be appropriate to revise the agreements between the parties.

COLORADO

MILLER ACT REMEDIES

U.S. f/u/b/o Daro Tech, Ltd. v. Centerre Govt. Contracting Group, LLC, 2014 U.S. Dist. LEXIS 38430 (D. Col. March 3, 2014).

Centerre Contracting Group (Centerre) was a subcontractor on a U.S. Department of Veterans Affairs (VA) renovation project at a Denver, Colorado medical center. Daro Tech, Ltd (Daro) was Centerre's subcontractor for asbestos abatement and demolition. Although Centerre increased the value of Daro's sub-subcontract due to project suspensions and delays, and the VA issued unilateral change orders, Centarre did not issue payment to Daro for the entire adjusted value. Under the Miller Act, Daro sought recovery of the unpaid balance against Centerre, the prime contractor, Kiewit Building Group, Inc. and Turner Construction Company (collectively, K-T), and its sureties.

K-T argued that Daro's claims were premature, as Daro had submitted change order proposals for delay and extra work through Centerre and K-T to the VA and those change order applications were still pending. K-T also contended that Daro's work was governed by the Contract Disputes Act (CDA), which requires a contractor to seek remedy with the contracting officer first, then through an agency board of appeals or the U.S. Court of Federal Claims. Lastly, K-T argued that under the Centerre-Daro agreement, Daro was required to follow the dispute resolution procedure outlined in Centerre's General Contract. Daro countered that, as a sub-subcontractor, the Miller Act was the proper remedy for recovery on a government contract as held in Fanderlik-Locke Co. v. U.S. f/u/o M.B. Morgan, 285 F.2d 939 (10th Cir. 1960).

The Court ruled in Daro's favor against K-T, concluding that Daro was not obligated to comply with CDA procedures prior to seeking a Miller Act remedy. However, the Miller Act only allows for causes of action on payment bonds between the general contractor and the U.S. Thus, the Court dismissed Daro's claim against Centerre as it was based on a bond issued under the sub-subcontract, not the prime contract.

DELAWARE

PROMPT PAYMENT STATUTE – BUILDINGS ONLY

VSI Sales, LLC v. Griffin Sign, Inc., 2014 U.S. Dist. LEXIS 57620 (April 25, 2014).

VSI, a subcontractor, installed highway signs and guardrails on a project but the contractor moved to dismiss the claim because this work arguably fell outside the scope of Delaware's Prompt Payment statute. The statute pertains to a contract for erection, construction, completion, alteration or repair of any building, or for any addition to a building. This "erection of a building" language is used repeatedly throughout the statute. The court concluded that the legislative intent was to address only construction of buildings. The court granted the motion to dismiss the claim since the referenced work fell outside the scope of the statute because since it did not relate to construction of a building.

HAWAII

CONTRACT AMBIGUITY

U.S. f/u/b/o Sealaska Constructors, LLC v. Walsh RMA JV, 2014 U.S. Dist. LEXIS 52874 (Hawaii April 16, 2014).

While working on an army construction project in Hawaii, Sealaska Constructors encountered a task it claimed was outside its scope of work. The contractor, Walsh RMA, argued that supplying and installing a drainage aggregate layer and choke stone was within the subcontract's scope. The District Court found the contract was ambiguous. The work was designated as Task 32-11-10 in the work documents, and this item was not plainly included in the list of subcontract work. However, one of the work specifications was for a sub-drainage system and the subcontract held Sealaska responsible for a complete sub-drainage installation.

To further complicate matters, Sealaska's own witness appeared to admit that the task was not included in the subcontract because of an administrative oversight, but Walsh RMS had documents listing the task as the responsibility of the asphalt contractor, not Sealaska. The Court ruled that summary judgment was inappropriate based upon the ambiguous subcontract language and conflicting evidence.

LOUISIANA

PROMPT PAY ACT APPLIES TO SPECIFIC "CONTRACT," NOT "PROJECT"

Quality Design and Construction, Inc. v. City of Gonzales, 2014 La. App. LEXIS 621 (1st Dist. March 11, 2014).

The City of Gonzales, Louisiana hired Quality Design and Construction, Inc. (QDC) to construct a children's "sprayground". The City executed a certificate of substantial completion for the work but did not pay QDC in full, withholding $54,000 for alleged outstanding warranty and defect claims. A trial court awarded QDC the unpaid balance.

The prompt payment statute refers to the "award and execution of the contract." The City argued that this meant satisfactory completion of the project rather than the individual contract with QDC. The Court disagreed, reasoning that the legislature would not have included the term "award" (contracts are awarded to one entity) if it had not intended to indicate amounts appropriated for a specific contract. The Court also ruled that mandamus was not conditioned on the availability of remaining funds, and held that the City could not withhold payment pending the outcome of its suit against QDC for warranty work and defective products. Moreover, the City had effectively nullified many of its own arguments by issuing a certificate of substantial completion before the warranty and repair work was completed.

MICHIGAN

CONTRACTUAL INDEMNITY

Miller-Davis Co v. Aherns Construction, Inc., 2014 Mich. Lexis 622 (April 15, 2014).

Aherns Construction, Inc. (Aherns) was the roofing subcontractor on the Sherman Lake YMCA natatorium project in Augusta, Michigan. In the spring of 1999, YMCA noticed excessive condensation in the natatorium. Upon examination, YMCA found deficiencies in the installation of the roof, and that Aherns had not installed the roof in compliance with the contract. Aherns refused to perform corrective work. Instead, the project's general contractor Miller-Davis Company (Miller-Davis) entered into an agreement with the YMCA and performed corrective work.

In May 2005, Miller-Davis filed suit against Aherns for the cost of the roof, and a circuit court awarded Miller-Davis $350,000 in damages. On appeal, the court reversed and held that the six-year statute of limitations period had run out, and the indemnification clause in the parties' contract did not affect this ruling because no claim was brought against Miller-Davis within the meaning of the indemnification clause.

The Supreme Court of Michigan disagreed and reversed. The Court held that the claim/demand at issue was for non-compliant roof installation. The subcontractor breached its contract twice: first when it failed to install the roof compliantly, and then when it refused to indemnify Miller-Davis for the corrective work. The Court conceded that Aherns' first failure to install the roof correctly exceeded the six-year statute of limitations. However, the second breach of the indemnity clause was independent of the first breach, and the corrective work was performed well within the six-year period and therefore recoverable. The Court ruled that the plain language of the indemnification clause extended to the subcontractor's failure to undertake corrective work as obligated by the subcontract.

NEW YORK

LOST PROFITS AS "DIRECT" AND NON-CONSEQUENTIAL DAMAGES

Myotronic A.G. v. Connor Med Systems Ireland, Limited, 2014 WL 1237514 (March 27, 2014).

In this case, the New York Court of Appeals in a 4-3 decision held that alleged lost profits from a distribution agreement were direct and general, and not indirect or consequential damages which might be precluded under the contract. Many construction contracts routinely contain provisions attempting to bar claims for "consequential" and other "indirect" or "special" damages. Here the plaintiff was a distributor of medical devices and the defendant manufactured a coronary stent the plaintiff contracted to become an exclusive distributor of the product in a certain geographical area. The manufacturer had trouble getting governmental approval for the product and took it off the market. The distributor claimed loss of profits as damages and sued to recover. The question was whether the contract allowed such damages because it contained a clause that neither party would be responsible for "…any indirect, special, consequential, incidental, or punitive damage with respect to any claim arising out of this agreement."

The four judge majority held that the alleged loss profits flowed naturally and proximately as a consequence of the breach and therefore constituted direct and general damages not barred by the

contract. The dissent argued that under the Uniform Commercial Code and other principles, such lost profit damages would be considered consequential damages and be precluded by the contract. One important point to the majority ruling was that these damages had nothing to do with losses or expenses incurred because of collateral arrangements or contracts with third parties who were not a party to the contract in question between the manufacturer and distributor.

The central point of the holding appears to be that since the main contract was to purchase and then distribute the medical device and earn profits from selling it, the alleged loss profits from any such sales and distribution were deemed to flow naturally from the contract and be a direct, expected consequence of its breach. This case is important by analogy to many construction contracts which contain similar clauses barring incidental, special, or consequential damages, and it offers a lesson on the importance of defining and categorizing damages in determining whether they fall within any contractual exclusions.
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NEW YORK

MOLD CLAIM DISMISSED

Cornell v. 360 West 51st Street Realty, LLC, 2014 WL 1237483 (Court of Appeals, March 27, 2014).

An apartment resident sued building owners for alleged personal injuries claimed to have suffered as a result of a prolonged mold condition. This claim was dismissed by a 4-2 decision by the New York Court of Appeals. The majority decision held that plaintiff's expert proof establishing a "possible association" between the mold and the injuries did not sufficiently establish causation to a reasonable degree of medical certainty. The evidence submitted did not demonstrate a sufficient "cause and effect relationship" entitling defendants to summary judgment. The two judge dissent disagreed finding that causation was sufficiently established, at least as a threshold matter of fact which should be resolved as a jury question.

OHIO

CONTRACT AMENDED BY CONDUCT

Frank Novak & Sons, Inc. v. A-Team LLC, 2014 Ohio App. LEXIS 905 (8th Dist. March 13, 2014).

A-Team, LLC, doing business as ServiceMaster (ServiceMaster), was the general contractor on a Cleveland Browns Stadium restoration project. It hired Frank Novak & Sons, Inc. (Novak) to perform painting, flooring and wall-covering work. Novak submitted invoices for work done to remediate two losses. ServiceMaster issued a partial payment for Loss 1 and no payment for Loss 2. Novak filed suit, alleging that ServiceMaster violated an oral contract. ServiceMaster argued that it and Novak had entered into a written agreement, and although Novak had never signed that contract, Novak's performance constituted acceptance of its terms.

The Court held that the written agreement could not stand as ServiceMaster did not present the agreement to Novak until after Novak had already begun work, and also because ServiceMaster itself had

not consistently complied with terms of the agreement. When considering the oral contract, the Court found sufficient evidence of an offer/acceptance and definite terms sufficient to make that agreement enforceable. Novak made a time-and-materials agreement with an authorized representative of ServiceMaster, completed the work and submitted an itemized invoice. ServiceMaster did not object to the invoice and indicated payment would be issued when the project owner released funds.

TEXAS

STATUTE OF REPOSE APPLIES TO CONSTRUCTION MANAGER

South Texas College of Law v. KBR, Inc., 2014 Tex. App. LEXIS 2809 (1st Dist. March 13, 2014).

In 1981, South Texas College of Law (South Texas) hired KBR, Inc. (KBR) to manage the construction of an 11-story annex to an existing building. The project was completed in 1984, but the tower began dropping brick and mortar in 2006. South Texas brought suit against KBR after engineering reports confirmed the masonry was not properly installed. KBR sought protection under a Texas statute of repose, Tex. Civ. Prac. And Rem. Code Ann. § 16.009(a), which required that all claims must be brought within ten years of a project's substantial completion. The statute explicitly applies the time limit to suits against "a person who constructs or repairs" the project. The parties acknowledged that KBR did not "physically hammer the nails and turn the screws" ,and that the statute extends protection to parties who are responsible and liable for the work even if they are not physically involved in the construction. However, the parties disagreed on whether the statute applied to KBR as a CM.

The Court held for KBR, finding that KBR was a "direct actor" in the construction process and therefore protected under § 16.009(a). This holding was based in part on allegations in South Texas's own complaint which contended that KBR as the construction manager (a) was "contractually obligated to monitor, manage and supervise" the masonry installation, (b) had a "legal duty to manage and supervise masonry work to ensure the work was performed in a good and workmanlike manner," and (c) was "negligent in its supervision and management of the activities and practices" of the general contractor and masonry subcontractor.