



## NYCLA CONSTRUCTION LAW JOURNAL

A publication of the NYCLA Construction Law Committee

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### Letter From the Vice Chair

Dear colleagues, we are thrilled to publish our third issue of the NYCLA Construction Law Journal. Over the past year, dozens of lawyers and industry professionals have contributed interesting and timely articles on a wide range of topics, including: construction financing; construction bonds and bond liability; labor law; mechanics' liens; and contract forms. Our sincerest thanks go out to those who continue to support and encourage the efforts of this Journal.

It would have been hard to miss the carpeting of the City with scaffolds and sidewalk bridges these past few months and the sounds of construction resonating from Wall Street to West 220<sup>th</sup> Street as landlords, condos and coops were inspecting and repairing their facades to comply with the latest Local Law 11 cycle. And now, as the summer winds down and our clients and companies begin to look ahead to future projects, we hope that you will find the articles and case summaries in this issue helpful and informative in your respective practices.

As always, we look forward to seeing all of you again at our upcoming Committee events and we encourage those of you thinking about membership to join us.

### Statement of the Editor In Chief

Dear construction law colleagues, our goal was to have three journal per year and we have reached that goal with this journal. Following along the path of the prior journals, this journal has cutting edge topics pertaining to the New York Lien Law, Bidding Statutes, and the usual case summaries. As we strive to make the journal the best it can be we are always looking for new articles and/or themes that would interest construction lawyers in the tri-state area. Any case, new law, or statute that may interest you and/or your client may have the same appeal to the rest of the construction bar. Here is to a good end of 2011 and an even better 2012.

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# Timing Of Expert Disclosure- Change Is On The Way<sup>1</sup>

By Richard E. Lerner and Judy C. Selmecki

Times are changing. The times that parties are required to make their expert disclosures, that is, are changing.<sup>2</sup> Traditionally, pre-trial orders direct the parties to disclose experts well after the note of issue (generally 60 or even 30 days prior to trial). Lately, the Second Department has come to require a different practice: The disclosure of experts prior to the filing of the note of issue. When disclosures are not done before the note of issue, Second Department has been precluding the parties' experts' summary judgment submissions. In the past, preclusion in the Second Department was applied primarily to the detriment of plaintiffs with respect to their oppositions to motions for summary judgment.<sup>3</sup> Occasionally, however, the court has precluded a defendant's expert on the main submission as well.<sup>4</sup> As the requirement for pre-note of issue disclosure gains momentum in the Second Department, a more consistent application to defendants' submissions seems inevitable. If uniformly applied, the approach might prevent a defendant from making a *prima facie* showing of entitlement to summary judgment with a previously undisclosed expert. This is to say, there is a real possibility that a defendant might inadvertently waive his right to obtain summary judgment if he fails to disclose his expert prior to the filing of the note of issue. In view of this possibility, defendants – particularly in cases venued in Second Department courts – are advised to evaluate early how they will handle the timing of expert disclosures.

## The Second Department's Split

CPLR §3101(d) requires disclosure of trial experts where a demand is made. The section itself does not have a timing rule. Traditionally, the disclosure schedule mirrors the parties' turns at trial – that is, plaintiff first, then defendant.<sup>5</sup> Since clairvoyance (even the kind acquired through many years of litigation practice) is not mandated by the CLPR, this sequence makes perfect sense: If the plaintiff has no expert, the defendant need not rebut any showing through an expert of his own. If the plaintiff does have an expert, the defendant need only defeat whatever theories that expert puts forth. And so, the defendant traditionally waits to see what the plaintiff is going to do. In many courts, both disclosures would be done in the weeks leading up to trial – which is to say, usually well after the note of issue has been filed.

Recently, the Second Department has been requiring a different practice. That court now appears to be mandating that expert disclosures be exchanged prior to the filing of the note of issue. Where disclosures are not made before the filing of the note of issue, the party who nevertheless certifies that discovery is complete may not use an undisclosed expert to defeat a summary judgment motion.<sup>6</sup> The practical effect of this rule is that, so long as a defendant is able to establish his *prima facie* entitlement to summary judgment, the motion has a good chance of becoming a foregone conclusion – unless the plaintiff has timely disclosed his expert or has presented a good excuse for not having done so before the note of issue was filed.

It is not clear how far the Second Department is willing to take this approach. The court appears reluctant to decide the motions on disclosure grounds alone and decisions have so far listed alternative grounds for their outcome.<sup>7</sup> This reluctance makes it

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<sup>1</sup> This article first appeared in the July 15, 2011 issue of the New York Law Journal.

<sup>2</sup> In 2009 Professor Patrick Connors described the disclosure timing rules as being in “shambles.” “Expert Disclosure, Is in Shambles,” *New York Law Journal* (Online), January 20, 2009. Since then, mere disarray has evolved into entrenched division between departments and a procedural problem for litigants.

<sup>3</sup> *King v. Gregruss Mgt.*, 57 A.D.3d 851, 853 (2d Dept. 2008) (holding that where “without expert testimony, the plaintiff will be unable to sustain his burden of proving his case ... summary judgment dismissing the complaint ... is appropriate.”); *Wartski v. C.W. Post Campus of Long Island University*, 63 A.D.3d 916 (2d Dept. 2009) (holding that the plaintiff's expert affidavit should not have been considered by the trial court because the expert had not been disclosed).

<sup>4</sup> *Stolarski v. DeSimone*, 83 A.D.3d 1042 (2d Dept. 2011) (holding that where a defendant failed to disclose its expert prior to the filing of the note of issue, its affidavit in support of the motion for summary judgment may not be considered and, having thus failed to make a *prima facie* showing, the motion was properly denied).

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<sup>5</sup> In the Third Judicial District, pursuant to local rule, expert disclosures must be made before the note of issue is filed (with responses due 60 days after filing of the note of issue). Untimely disclosures are accepted, however, unless the failure to disclose was intentional and the opposing party has been prejudiced. *Silverberg v. Community General Hospital*, 290 A.D.2d 788 (3d Dept. 2002).

<sup>6</sup> See note 2; see also *Gerry v. Commack Union Free Sch. Dist.*, 52 A.D.3d 467, 469 (2d Dept. 2008); *Gralnik v. Brighton Beach Assocs.*, 3 A.D.3d 518 (2d Dept. 2004)

<sup>7</sup> *Pellechia v. Partner Aviation Enterprises, Inc.*, 80 A.D.3d 740 (2d Dept. 2011) (holding that the defendant was entitled to summary judgment, where the plaintiff's expert's affidavit in opposition could not be considered because the expert was not timely disclosed and the affidavit was, in either event, conclusory, speculative and not based on industry standards); *Kopeloff v. Arctic Cat, Inc.*, 84 A.D.3d 890 (2d Dept. 2011) (holding that the affidavit of plaintiff's expert was properly precluded for failure to disclose the expert and that even if considered it would not have defeated the motion because it was speculative, conclusory and not properly supported).

unlikely that the court would grant, as a matter of course, motions premised only a lack of disclosure from the plaintiff (and his consequent inability to prove his case at trial). Still, this argument has been made successfully.<sup>8</sup> Defendants should evaluate whether their particular case lends itself to such an application.

### **The Underlying Rationale**

The majority of the cases applying the rule for preclusion of undisclosed experts' affidavits recite that the affidavit is being offered after the filing of the certificate of readiness.<sup>9</sup> Of course, while there is no rule requiring that it be so, the note of issue is usually filed by the plaintiff. In practical terms, this means that the Second Department's new approach, at least so far, has been applied overwhelmingly (though not exclusively)<sup>10</sup> to plaintiffs' detriment. The rationale for the approach appears to be this: If the plaintiff closed discovery by certifying the case ready for trial, he may not make any additional disclosures.<sup>11</sup>

### **A Suggested Approach**

Offensively (that is, to preclude the plaintiff's expert), defendants should make a demand for expert information and diligently follow up on this demand. If the plaintiff files the note of issue without having provided a disclosure, this should be noted in the motion for summary judgment. Defensively, strategic consideration should be given to the possibility that if the note of issue is filed before expert disclosures, the defendant's expert might be precluded regardless of the plaintiff's failures. This can, of course, doom a

summary judgment motion. Practitioners should plan ahead in order to avoid such an outcome.

One option is to just make the expert disclosure. Of course, while straightforward, this solution is not without peril. Indeed, its strategic downside might outweigh any procedural benefit. Cases where the defendant's expert is expected to say the same thing no matter what the plaintiff's expert's theory may be are best suited for this solution. In premises-liability cases, for example, the expert might opine that the space between the wall and the railing complies with code requirements. The remainder of the defendant's summary judgment burden (having to do with notice, etc.) will not come from the expert. So, disclosing the expert early might not reveal the defendant's summary judgment strategy.<sup>12</sup>

In other cases (medical malpractice being chief among them), summary judgment might turn on the defendant's expert's affirmation. Early disclosure of the defendant's theory might permit the plaintiff to realign his case prior to the filing of the note of issue (including by amendment of the bills of particulars). Under such circumstances, early disclosure might jeopardize the defendant's case.

If no disclosures are made, defendants will likely have to offer an "excuse" for not having disclosed experts prior to the filing of the note of issue. One argument is that the defendant could not provide an expert response until after receipt of the plaintiff's disclosure. This, the defendant would argue, flows from the parties' respective burdens and the fact that the defendant's expert, ultimately, need only *respond* to the plaintiff's. So, the argument would go, the defendant had no obligation to disclose until the plaintiff's disclosure was served. This argument is merely an extension of the rule that the plaintiff's disclosures affect evaluation of the sufficiency of the defendant's disclosures.<sup>13</sup>

This approach is not without risk. In their motions, the parties must offer evidence "in admissible form." The Second Department (over a strong dissent) has found that this admissibility rule applies to the affidavits of experts.<sup>14</sup> Meanwhile, the defendant has no *prima*

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<sup>8</sup> *Bickford v. St. Francis Hospital*, 19 A.D.3d 344 (2d Dept. 2003) (holding that the complaint must be dismissed where the plaintiff's failure to timely disclose her expert was prejudicial to the defendants).

<sup>9</sup> *Gerardi v. Verizon New York, Inc.*, 66 A.D.3d 960, 961 (2d Dept. 2009) (holding that because "the expert was not identified by the plaintiff until after the note of issue" the expert's affidavit could not be considered); *Ehrenberg v. Starbucks*, 82 A.D.3d 829, 830-1 (2d Dept. 2010) (holding that "the affidavit of the plaintiffs' expert ... should not have been considered ... since that expert witness was not identified by the plaintiffs until after the note of issue ... and the plaintiffs offered no valid excuse for the delay.") (The authors of this article represented Starbucks in the *Ehrenberg* case).

<sup>10</sup> *Yax v. Development Team, Inc.*, 67 A.D.3d 1003 (2d Dept. 2009) (holding that, while the plaintiff's summary judgment motion was properly denied, the defendant's expert's affidavit should not have been considered because the expert was not disclosed pre-note of issue).

<sup>11</sup> Carrying the argument to its logical conclusion, this should also mean that by filing the note of issue the plaintiff waives any outstanding demands, including demands for the defendants' expert disclosures. *Simpson v. City of New York*, 10 A.D.3d 601 (2d Dept. 2004) (holding that the plaintiff waived outstanding discovery by filing the note of issue).

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<sup>12</sup> If defendants' expert disclosures are made first, we believe the defendant should include generic provisions for testimony to counter the plaintiff's theories, and a reservation of the right to amend the disclosures once the plaintiff's disclosures are received.

<sup>13</sup> *Beard v. Brunswick Hospital Center*, 220 A.D.2d 550 (2d Dept. 1995) (holding that the defendant's expert disclosure was proper in view of the broad theories laid out in the plaintiff's disclosures).

<sup>14</sup> *Construction by Singletree v. Lowe*, 55 A.D.3d 861 (2d Dept. 2007) (holding that the affidavits of undisclosed experts in opposition to summary judgment could not be considered).

*facie* burden at trial so he might choose to not call an expert at all. Yet if no expert disclosure is made, the defendant might be precluded from establishing his *prima facie* entitlement to summary judgment. This dilemma did not escape Judge Carni, who, in his dissent in the *Singletree* case, argued that CPLR §3101 only requires disclosure of trial experts. He believed that where an expert is only a consultant for summary judgment, no disclosure is necessary.<sup>15</sup> The majority rejected this argument. Still, defendants might consider a modified approach, in which they point out that their expert was not previously disclosed because the plaintiff did not make its disclosure, and because the defendant may choose to not call an expert at trial since the plaintiff's failure to disclose an expert warrants preclusion. It is unclear whether this argument would prevail, but – at least in cases where a defendant cannot make his disclosure first – it might help even the odds.

While the Second Department's approach is in flux it is impossible to say what the right method for the timing of expert disclosures. In view of the uncertainty caution, savvy and, perhaps, the continuing exchange of ideas are in order.

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<sup>15</sup> For a detailed discussion of the *Singletree* case, see Professor David Horowitz's article in the January 2009 edition of the *New York State Bar Journal*, titled "What about the CPLR?" 81 Jan. N.Y. St. B. J. 20 (2009)

## The Devil Is In The Details Of A Surety Takeover Agreement

By Gary Strong, Esq.

The relationship between a surety and obligee that arises from a principal's default is born out of contractual obligation. One of the initial and most important decisions for a takeover surety is selecting a completion contractor, more specifically, deciding whether to use the defaulted bond principal. This decision directly impacts the surety's likelihood of success and can be controversial. The use of a bond principal can be an effective means to avoid unnecessary delays and minimize loss. However, obligees are often concerned with the prospect of the bond principal completing the project. The obligee's reaction typically lies somewhere between shock and outrage. After all, from the obligee's perspective, it was the bond principal that created the problem in the first place.

A takeover agreement is critical to defining the parties' expectations and obligations, as well as minimizing risk. Although a takeover can be accomplished without a formal takeover agreement, such a scenario should be approached with heightened caution. If an obligee refuses to enter into a takeover agreement, a surety is well-advised to take a step back and reevaluate the wisdom of selecting the takeover and completion option. Unforeseen circumstances arise on nearly every construction project, and surety completion work is no exception. Even the best pre-takeover investigation is useless in the face of the inevitable project where everything that can go wrong, does go wrong. A surety's best protection is a comprehensive and thorough takeover agreement that attempts to address all contingencies.

*Caravousanos v. Kings County Hospital*<sup>1</sup> is a good recent example of how easy it can be to reach different understandings about contract obligations and why is it important to proactively define them. In *Caravousanos*, the court considered whether a completing surety on a subcontract bond assumed the indemnification and insurance obligations of the bonded contract, in addition to the work obligations.

In *Caravousanos*, the bonded Subcontractor/Principal defaulted on its obligations and the Surety hired a completing contractor under a completion contract specifically providing that the completing contractor would "perform and complete" the remainder of the project work "in accordance with the terms contained in the original Subcontract." The completing subcontractor further agreed that it would

"furnish at its own expense all workers compensation, general liability insurance, and other insurance as specified in the original Subcontract." The completing subcontractor did not, however, apparently obtain insurance running to the benefit of the Obligee. After Mr. Caravousanos (an employee of a separate consultant to the Surety) suffered personal injuries, he commenced suit against the Obligee and Owner. The Obligee tendered the defense to the completing contractor and its carrier, but the tender was rejected. The Obligee sued the Surety and the completing contractor, alleging an entitlement to contractual indemnification as well as breach of contract for failing to obtain insurance for the benefit of the Obligee.

The Court, in response to a motion to dismiss, denied the Surety's attempt to avoid liability finding that the terms of the performance bond were ambiguous, especially with regard to the term "arrange," because one reasonable interpretation would mandate that the Surety take on any and all responsibilities originally assigned to the Principal under the Subcontract, including requirements for indemnification and the posting of insurance. There was nothing within the bond itself limiting what might fall under the category of "arranging" and there was nothing to indicate a limitation to the performance of the physical work described in the Subcontract.

The term "arrange" is present in all of the AIA standard forms. In *Caravousanos* it appears that the issues were further clouded by reason of the fact that the completion contract required that the completing contractor "perform and complete the remainder of the project work originally undertaken by the Principal." It is unclear whether or not there was a takeover agreement or other understanding between the Surety and the Obligee that limited the scope and extent of the Surety's responsibilities. However, it seems the entire dispute may have been avoided had the completing contractor appropriately obtained insurance extending to the benefit of the Obligee, as well as the Surety. While it may be wise to consider adding limiting language to take over and/or completion agreements, in this particular circumstance, the Surety could have prevented this dispute by mandating that its completing contractor obtain insurance that would extend to, and protect, both the Obligee and Surety.

In yet another dispute regarding completion contract obligations, a New Jersey court recently considered the remedies available to a completing surety that discovered, after beginning completion work, that the bond principal had been paid for defective work.<sup>2</sup> In

<sup>1</sup> 74 A.D.3d 716 (2d Dept. 2010).

<sup>2</sup> *Deluxe Building Systems, Inc. v. Constructamax, Inc., et al.*, 2011 U.S. Dist. LEXIS 12189 (D.N.J. 2011).

addition to dealing with the unanticipated defective work, one of the surety's biggest problems was that it had agreed to complete the project within eight months of the date of the takeover agreement. Notwithstanding this agreement, the project was still not complete thirty-four months after the date of the agreement. The surety believed that it had adequate grounds to stop work and notified the obligee of its intent to cease work and terminate the takeover agreement. Unfortunately for the surety, the court did not agree. Its decision was based, at least in part, on a term in the underlying contract incorporated by reference into the completion contract stating that the only valid basis for stopping work was non-payment of approved applications for payment.

On a motion for partial summary judgment, the court ruled in favor of the obligee based on relatively simple facts: the takeover agreement indisputably provided eight months to complete the project; the express terms of the takeover agreement stated that failure to complete the project within that period constituted a material breach of the agreement; the takeover agreement contained a liquidated damages provision of \$7,227.00 per day; and the surety was not granted an extension of time and the project was still not complete thirty-four months after the date of the takeover agreement.

Situations like those presented in *Deluxe Building Systems* demonstrate the importance of understanding remedies available, or in some cases unavailable, under the bonded contract. Many construction contracts now include provisions depriving contractors of the right to stop work for any reason, except for non-payment of approved applications for payment. In those situations, sureties are sometimes left to pursue other sources of recovery, such as the obligee's architect.

Ultimately, sureties understand that it is impossible to avoid being called upon to fulfill an obligation of a principal that did not live up to its end of a bargain. Sureties also understand that the relationship with the obligee on a performance bond is a short-term marriage of convenience, generally defined by contract documents. Nonetheless, keeping that in mind can be easier said than done, especially when a bond obligee invites the surety to a shotgun wedding with a completion contractor of the obligee's choice, or when an obligee refuses to give reasonable concessions in response to defective work discovered after the completion work begins.

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## Filing A Mechanic's Lien Against A Public Improvement Project In New York

By Anthony H. Rapa, Esq.

When filing a lien against a public project in New York, care must be taken to comply with the notice requirements set forth in §12 of the Mechanic's Lien Law. Although there are many similarities between public and private liens, there are also several important distinctions that, if not respected, can create serious trouble for your client down the road.

Called a "lien on account of public improvement," public liens attach, as the name implies, only to the funds set aside for the public improvement project.<sup>1</sup> As a public lien therefore does not encumber an ownership in real property, it does not need to be filed with the County Clerk where the public project is located. Rather, it should be served via certified mail on the head of the public entity in charge of the project and either: (1) the New York State Comptroller's Office; (2) the public entity's financial officer; or the ubiquitous catch-all (3) "any other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made."<sup>2</sup> Consequently, there is no fee to file a public lien.

As with private liens, §12 provides for a list of items that must appear on the face of the notice of a public lien.<sup>3</sup> The Lien Law explicitly provides that the accuracy of this information must be verified by the lienor. The lienor must first set forth his or her name and business address and, if a foreign corporation, the principal place of business in New York. Case law states that a foreign corporation must first become authorized to conduct business in the state before filing a lien,<sup>4</sup> and should give an address for an in-state attorney if it does not maintain an office in New York.<sup>5</sup> If the lienor is a partnership, the notice should also contain the partners' names.

The notice must state the name of the contractor of subcontractor that employed the lienor. This requirement is flexible, however, as §12 explicitly states that a failure to correctly name the contractor or subcontractor does not affect the lien's validity.<sup>6</sup> It should be noted that, unlike a private lien, a public lien may only be filed by a party in direct privity with the general contractor or its subcontractor.<sup>7</sup> This is a substantial deviation from private liens, and means that general contractors and third-tier subcontractors must look elsewhere for relief.<sup>8</sup>

The notice must also set forth the amount and the due date of the sum or sums in question. Courts have held that this requirement can be met simply by stating that the amount is "now due"<sup>9</sup>, or even by affixing the parties' contract to the notice and incorporating its contents therein.<sup>10</sup> As with private liens, willful exaggeration of the amount claimed in the notice will render the notice of lien void and subject the lienor to statutory penalties.<sup>11</sup>

The notice must contain "a general description of the public improvement and of the contract pursuant to which the public improvement was constructed or demolished."<sup>12</sup> This requirement has been met where, for example, the notice stated that the lienor was hired by a named contractor to construct a firehouse at a specific location.<sup>13</sup> As such, one should also state the location of the improvement, even though this requirement is not contained on the face §12.<sup>14</sup> Finally, the notice should set forth the kind of labor performed and/or materials furnished, and list any materials actually manufactured by the lienor for, but not delivered, to the project.<sup>15</sup>

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<sup>1</sup> Labor Law 5. This includes funds set aside by the State of public corporation for the project, the general contractor's payment bond and/or to trust funds i.e. funds received by the contractor or sub that is to be paid their subs, laborers, or materialmen. See also *Stephen Miller General Contractors, Inc. v. Joseph Davis, Inc.*, 33 A.D.2d 1132 (3d Dept. 2006).

<sup>2</sup> Lien Law §12.

<sup>3</sup> Id.

<sup>4</sup> *Italian Mosaic & Marble Co. v. City of Niagara Falls*, 131 Misc. 281 (N.Y. Sup. Ct. 1928). See also *Interstate Home Builders, Inc. v. D'Andrea Const., Inc.*, 2001 WL 1682795 (N.Y. Sup. Ct. 2001) interpreting a similar provision in the Private Lien law.

<sup>5</sup> *In re New Jersey Window Sales, Inc.*, 190 Misc 654 (N.Y. Sup. Ct. 2002) (interpreting a similar provision dealing with Private Liens).

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<sup>6</sup> Lien Law §12 ("If the name of the contractor or subcontractor is not known to the lienor, it may be so stated in the notice, and a failure to state correctly the name of the contractor or subcontractor shall not affect the validity of the lien.").

<sup>7</sup> Lien Law §5.

<sup>8</sup> *Kayfield Construction Corp. v. Glazed Block Corp.*, 261 N.Y.S.2d 202 (N.Y. Sup. Ct. 1965).

<sup>9</sup> *Application of Callanan Industries, Inc.*, 88 Misc.2d 802 (N.Y. Sup. Ct. 1976).

<sup>10</sup> *Cameron Equipment Corp. v. People*, 55 Misc.2d 645 (N.Y. Sup. Ct. 1968)(citing *Bluff Point Stone Co. v. U.S. Fidelity and Guar. Co.*, 180 App.Div. 832 (3d Dept. 1917)).

<sup>11</sup> Lien Law §§ 39,39(a).

<sup>12</sup> Lien Law §12.

<sup>13</sup> *Border v. Frank G. Cook & Sons*, 240 A.D. 476 (4<sup>th</sup> Dept. 1934).

<sup>14</sup> *Dwelle-Kaiser Co. v. Frid*, 233 A.D. 427 (4<sup>th</sup> Dept. 1931), aff'd 259 N.Y. 546 (1932).

<sup>15</sup> If no claim is being made for materials made but not delivered to the public improvement, the notice does not have to state as much. *New Jersey Terra Cotta Co. v. City of New York*, 112 Misc. 510 (N.Y. Sup. Ct. 1920).

A reading of the case law cited and discussed above reveals one consistent truth. As with private liens, the Lien Law explicitly states that a lienor's notice should be liberally construed, and the case law is rife with examples of courts going to great lengths to find substantial compliance.<sup>16</sup> The Lien Law also allows for the amendment of the notice, thereby making it very difficult to discharge a lien for purely "technical" reasons.

The time period to file a lien against a public improvement is much shorter than with private liens. While both can be filed at any time before the project is completed, a public lien must be filed within thirty days after the public improvement project is both "completed and accepted" by the State. This is a fact-sensitive inquiry, and is determined on a case-by-case basis. For example, a notice of lien was timely filed where the municipal corporation took possession of a project three years before the notice was filed but failed to execute a certificate of completion, as called for in the parties' contract.<sup>17</sup> While it is customary to state that 30 days have not yet elapsed on the face of the lien, it is not required.<sup>18</sup>

Finally, a copy of the notice must also be served via certified mail upon the general contractor or subcontractor that employed the lienor.<sup>19</sup> If the lienor was employed by a subcontractor, the notice must also be served on the general contractor despite the lack of privity.<sup>20</sup> The notice must contain proof of service upon these parties, as a failure to do so will both nullify the lien and make the lienor liable for costs incurred by the contractor in obtaining their own copy.<sup>21</sup>

In summary, §12 of the Lien Law provides for some procedural nuances that can easily catch attorneys unaccustomed to private liens off guard. Hopefully, this article helped bring attention to these differences, and will serve as a useful starting point for your own examination of the statute.

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<sup>16</sup> Lien Law §23.

<sup>17</sup> *Schenectady Mun Housing Authority v. Keystone Metals Corp.*, 245 A.D.2d, 725, 728 (3d Dept. 1997) ("If requirements regarding formalities of acceptance are specified in the contract, such as the filing of final certificates of acceptance, they must be followed as set forth and a subcontractor may rely on those provisions in deciding when to file a notice of lien."(citations omitted).

<sup>18</sup> *In re Application of Flushing Asphalt Corp.*, 188 Misc. 304 (N.Y. Sup. Ct. 1946).

<sup>19</sup> Lien Law §11-c.

<sup>20</sup> *Id.*

<sup>21</sup> Lien Law §12.

# Building Information Modeling Is Revolutionizing Construction<sup>1</sup>

By Robert C. Epstein, Jacqueline Greenberg Vogt and David C. Jensen

Building information modeling (BIM) is the most exciting development in construction in a generation and is transforming the way projects are designed and built. By creating a three-dimensional virtual simulation of a construction project, BIM has the potential to revolutionize construction by reducing costs, increasing quality, reducing conflicts and even achieving designs that would be impossible without this technology. In the very near future, BIM will overwhelm the construction industry and become the standard of practice for design and construction in the 21<sup>st</sup> century.

BIM is a technology that uses construction information to form a three-dimensional simulation of a construction project. BIM does not provide just a three-dimensional *depiction* of a construction project. Rather, BIM creates a digital *simulation* of a structure that can be digitally viewed, tested, modified, redesigned, constructed and deconstructed.

BIM is fundamentally different from traditional design tools. Computer Aided Design (CAD), used overwhelmingly by most designers for decades, depicts construction elements with lines that define a structure's geometry. In contrast, using BIM, each element of the structure is an "intelligent" object containing a broad array of information in addition to physical dimensions. Each element in a BIM model "knows" how it relates to other objects and to the design in general. With BIM, walls are objects which can be stretched, joined and moved, and which "know" that they have certain properties. For example, a wall in a BIM model "knows" that it is supposed to extend from the foundation up to Level I. If either of those parameters changes, the height of the wall will automatically adjust to match. Similarly, doors and windows "know" their relationship to the wall in which they are placed and behave accordingly.

BIM is the most powerful tool yet conceived for improving the construction process. Designers can use BIM to explore alternative concepts and optimize their designs. Contractors can use the model to "rehearse" construction, coordinate drawings and prepare shop and fabrication drawings. Owners can use the model to optimize building maintenance, renovations and energy efficiency, as well as to monitor life cycle costs. BIM allows for collaboration among designers, constructors

and owners in ways the construction industry has never known before.

The potential benefits of BIM on construction projects are startling. Some uses of BIM are listed below.

## Single Data Source

All construction projects require access by many parties to the same information. Under prevailing practices, the identical information is repetitively entered by separate parties into separate computer programs, each designed to provide a specific analysis. Every repetition is an opportunity for error.

In contrast, BIM allows project parties to capture everything known about a building in a single project database. Plans, elevations and section drawings, all generated from a single design model, are then always consistent. By having a single, unified data source, the risk of errors in data entry or translation is greatly reduced, and the risk that parties will proceed based upon conflicting information is minimized.

## Clash Detection

In complex construction projects, design drawings must be coordinated to assure that different building systems do not clash and actually can be constructed in the allowed space. System conflicts are a primary source of contractor claims and unexpected delays. The traditional approach to system coordination, which has been used for decades, is to overlay two-dimensional drawings on a light table, or to merge drawings for each system into color-coded composite drawings. These processes are tedious and fraught with the potential for errors. BIM greatly increases the ability to detect system clashes and conflicts during design review by allowing integration of all key systems into the model. This allows conflict checking to occur rapidly and accurately in three-dimensional visualization, before construction begins.

The dramatic difference between BIM and traditional methods for clash detection was illustrated in a 2005 federal courthouse project in Jackson, Mississippi, conducted as a BIM pilot project by the federal General Services Administration. Before construction began, an independent review team used two different methods to analyze the designs for constructability issues and system conflicts. One review was performed using a three-dimensional BIM model and the other was done using traditional two-dimensional drawings. The BIM model reviewers found 257 constructability issues and 7,213 conflicts. The traditional plan reviewers found six constructability issues and one conflict.

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<sup>1</sup> This article was first published in the October 19, 2009, issue of the New Jersey Law Journal. C. 2009 ALM Media Properties LLC.

### **Take-offs and Estimating**

To determine a project's construction cost, contractors traditionally perform material "takeoffs" manually, a process fraught with the potential for error. With BIM, the model includes information, or can link to information, which allows a contractor to accurately and rapidly generate an array of essential estimating information, such as materials quantities and costs, size and area estimates, and productivity projections. As changes are made, estimating information automatically adjusts, allowing greater contractor productivity.

### **Shop and Fabrication Drawings**

Under traditional design practices, fabricators of building components or systems must review the plans and specifications and prepare fabrication drawings which must be approved by the design team before fabrication can begin. This time-consuming process is laden with the risk of errors which, when discovered in the field, inevitably cause delays, increased costs and claims.

BIM models significantly reduce the risk of fabrication errors because conflicts can be resolved through the model. Also, because BIM can provide accurate construction details, the models can reduce fabrication costs by limiting the fabricator's detailing effort and providing greater assurance that prefabricated components will fit in the field. As a result, more construction work can be performed offsite in controlled factory conditions and then efficiently installed at the site.

### **Energy Efficiency and Building Life Cycle Management**

BIM models are being used to model and evaluate energy efficiency, monitor a building's life cycle costs and optimize facilities management. BIM allows the owner to evaluate upgrades for cost-effectiveness, and provides an accurate as-built model for operations and maintenance throughout a building's life cycle.

BIM promises to exponentially improve design and construction. BIM allows design optimization, fewer construction errors, fewer design coordination issues, and thus, fewer claims. Contractors benefit through less coordination and engineering effort, reduced fabrication costs and more accurate costing data. Owners can use the model to improve management and operation of the facility. In short, BIM offers the promise to actually accomplish what the construction industry has always sought to achieve — increased productivity coupled with decreased costs, shorter project delivery times and fewer disputes.

Despite BIM's vast potential, its widespread adoption faces significant obstacles.

There is a wide spectrum of possible uses of BIM on construction projects. At one extreme, architects and engineers can use BIM simply to produce better quality design documents without providing the digital model to any other party. Contractors separately can create models for estimating, fabricating or simulating construction without sharing the models. Used in these limited ways, BIM does not come close to realizing its powerful potential. At the other end of the spectrum, BIM can provide a collaborative framework among all project parties, allowing the free flow of data about what is being designed and how it will be constructed. The collaborative use of BIM takes full advantage of BIM's capabilities.

However, the collaborative use of BIM also fundamentally alters traditional construction project relationships and presents new risks and issues.

### **Designer Liability Exposure**

In a collaborative BIM setting, many parties contribute to the design. Crucial details embedded in the design may be provided not by licensed design professionals, but by specialty subcontractors or vendors. In addition, BIM software is designed to react to changes in the model, by modifying elements of the design affected by a change. Moreover, BIM software "knows" the building codes and applicable engineering principles and applies that information to the model.

These circumstances increase the potential liability exposure of design professionals who use BIM collaboratively. Under the law in all states, the architect or engineer of record must be in "responsible charge" of the design, meaning that the designer either must perform or directly supervise performance of the work. The plans are sealed by the responsible professional to signify compliance with this requirement and acceptance of the associated responsibility. Based upon these traditional legal principles, the designer is responsible for the entire design produced by BIM, even though crucial elements may have been provided by others or by the BIM software itself. This enhanced liability exposure of design professionals is a disincentive to the widespread, collaborative use of BIM.

### **Different BIM Models**

Ideally, a construction project would utilize a single BIM model which is used by the designers, contractors, subcontractors and fabricators for all purposes. Each party could access the model at will, adding content that all others could immediately utilize. The reality is that there rarely will be a single BIM on a complex project. The architect may have its design model, each engineer may have an analysis model for its discipline, the contractor may have a construction simulation model and the fabricator its shop drawing or fabrication model.

Interoperability — the sharing of information between these different models — is critical to the collaborative use of BIM, by assuring that each model consistently represents the same building. However, current technology does not yet allow seamless coordination between different BIM applications. The use of multiple models undermines the collaborative use of BIM and prevents project parties from reaping the full benefits of BIM's capabilities.

Because BIM's benefits are so compelling, it is inevitable that, over the next several years, its use will become nearly universal. BIM is transforming how buildings are designed and built, and redefining the traditional roles of designers, contractors, subcontractors and fabricators. With its great promise of increased productivity, decreased costs, shorter delivery times and fewer disputes, all through true project party collaboration, BIM is destined to soon become the standard practice for all design and construction.

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# Deciphering The “Extent” Of The Subcontractor’s Mechanic’s Lien Under New York Law

By Rosalie Valentino

A fundamental principle of New York construction law is that a subcontractor’s rights are derivative of the general contractor’s rights. Section 4 of the NY Lien Law, entitled “Extent of Lien”, embodies this principle: When a subcontractor files a mechanic’s lien, the lien can only be satisfied out of the funds due and owing from the owner to the general contractor at the time the lien is filed and any sum subsequently earned thereon<sup>1</sup>. In a sense, the subcontractor’s mechanic’s lien operates as an attachment on the amount the owner owes the general contractor.

A significant amount of case law describes how the subcontractor’s mechanic’s lien fund will be calculated in the context of a garden variety mechanic’s lien foreclosure action as follows:

1. If any monies are due to the general contractor when the subcontractor’s lien is filed, that represents the lien fund;
2. If nothing is due to the general contractor on the date the subcontractor’s lien is filed, a lien fund may later be created by funds that become due; or
3. If the general contractor is terminated and no monies are due to the general contractor at the time the subcontractor’s lien is filed, the lien fund may be created by the difference between the legitimate cost of completion and the undisputed contract balance at the time of termination; If the cost of completion exceeds the contract balance, no lien fund can be created.

However, a subcontractor’s situation does not always fall neatly into these three categories, and when that occurs, the “extent” of a subcontractor’s lien fund becomes murkier. For instance, issues may arise as to: (a) whether an owner’s termination of the general contractor for convenience has any impact on the calculation of the lien fund; (b) whether a lack of a formal contract between an owner and general contractor will preclude a subcontractor from establishing that a lien fund exists; or (c) whether the lien fund can be affected by a settlement agreement between the owner and the general contractor. This article will briefly explore these three issues.

## The termination of a general contractor for convenience allows the subcontractor to explore more possibilities in its attempt to establish that a lien fund exists.

More often than not, an owner’s attorney who receives notice that a subcontractor has filed a mechanic’s lien on private property will claim one of two defenses: (1) there is no lien fund because the owner has paid the general contractor in full; or (2) there is no lien fund because the general contractor was terminated and the owner incurred costs to complete the project and/or correct the work performed by the general contractor.

The owner’s first response, if proven, is a complete defense to a lien action. The latter defense, however, does not clearly address how the lien fund is calculated when a general contractor is terminated for convenience. There is no New York case law that addresses this issue directly or comprehensively. Nevertheless, if the general contractor is terminated for convenience, it seems that courts should calculate the subcontractor’s lien fund another way. This is because a calculation based on the difference between the cost of completion and the contract balance at the time of the termination presupposes that the general contractor was terminated for cause.

Courts presented with this fact pattern may analogize to an owner’s rights to counterclaim for the costs of completing the project after the general contractor is terminated for convenience. Under New York law, where an owner “elects to terminate for convenience...whether with or without cause, it cannot counterclaim for the cost of curing any alleged default.”<sup>2</sup> If the owner who terminates for convenience cannot recover completion costs from the contractor, a subcontractor can argue that the owner should also be precluded from offsetting its costs for completion against the available lien fund.

In addition to this case law, the specific contractual provisions governing the general contractor’s rights in the event the owner terminates for convenience could also play a pivotal role in the subcontractor’s endeavor to establish an available lien fund. Depending upon the contract’s terms, a subcontractor could argue that its lien attached to payment due and owing for work performed by the general contractor, the costs incurred by the general contractor as a result of the termination, or reasonable overhead and profit on work not performed. In our practice, particularly in our representation of subcontractors in mechanic’s lien foreclosure actions,

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<sup>1</sup> See *DiVeronica Bros. v. Basset*, 213 A.D.2d 936, 937 (3d Dept. 1995); *Electric City Concrete Co. v. Phillips*, 100 A.D.2d 1 (3d Dept. 1984); *Albert J. Bunce, Ltd. v. Fahey*, 73 A.D.2d 632 (2d Dept. 1979).

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<sup>2</sup> *Paragon Restoration Group, Inc. v. Cambridge Square*, 42 A.D.3d 905 (4<sup>th</sup> Dept. 2007) quoting *Tishman Construction Corp., Inc. v. The City of New York*, 228 A.D.2d 292, 293 (1<sup>st</sup> Dept. 1996).

such arguments have successfully created issues of fact to defeat an owner's motion for summary judgment to cancel and vacate a subcontractor's mechanic's lien.

Thus, when a general contractor is terminated for convenience, a subcontractor who cannot point to a conventional source for a lien fund should not give up on its claim, as courts may be receptive to theories that go beyond these traditional sources.

**Despite the lack of a written contract between the owner and general contractor, a subcontractor can successfully foreclose on its mechanic's lien.**

Under typical circumstances, an owner pays a general contractor pursuant to a written contract with a clearly outlined and agreed upon schedule of values and payment procedure. In turn, the written payment terms established between the owner and general contractor provide the subcontractor with the basis for assessing whether or not a lien fund exists. There are times, however, when the owner and general contractor have an informal relationship and never enter into a formal contract. Yet, a subcontractor's mechanic's lien cannot be defeated even in the absence of a formal written contract between the owner and the general contractor. In *104 Contractors, Inc. v. R.T. Golf Associates, L.P.et.al.*, 270 A.D.2d 817 (4<sup>th</sup> Dept. 2000), the owner and general contractor never reduced their agreement to a formal written contract and, notably, never agreed to a maximum price on the contract. However, their course of conduct demonstrated that the owner made payments based upon a cost plus percentage formula. The court held that the subcontractor, who had filed a mechanic's lien after the owner had already terminated the general contractor, was entitled to a mechanic's lien based on the same arrangement. This follows the fundamental principle described above: A subcontractor's rights derive from those of the general contractor.

**The calculation of the lien fund can be impacted by a settlement between the owner and general contractor.**

When it is unclear what amount, if any, is owed by the owner to the general contractor, the subcontractor must first wait for a resolution of that dispute. In *Electric City Concrete Company, Inc. v. Phillips*, 100 A.D2d 1 (3d Dept. 1984), the Third Department held that the amount of the lien fund can be decided by a settlement between the owner and general contractor, thereby diminishing the available lien fund. There, two separate mechanic's lien foreclosure lawsuits were commenced and later consolidated with the owner's breach of contract lawsuit against the general contractor. At a pre-trial conference, the subcontractor-lienors agreed to allow the trial between the owner and the general contractor to proceed first. During the trial, a settlement was reached between the owner and the

general contractor which dictated the amount of the lien fund available to the subcontractors foreclosing their mechanic's liens. The subcontractors were bound by the terms of the settlement reached between the owner and the general contractor as to the amount due and owing. As a result, the satisfaction of the subcontractors' mechanic's liens could only be satisfied out of the agreed upon amount between the owner and general contractor.

**Conclusion:**

Although the unique facts and circumstances of each case may affect the size or existence of a lien fund available to a subcontractor, courts analyzing a subcontractor's mechanic's lien claim will ultimately look to the funds due and owing to the general contractor at the time the lien was filed to determine the existence of a lien fund.

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## CleanTech: The Cure For America's Fossil Fuel Addiction

By Sarah Biser, Esq. and Ran Kohn

One day soon, American may come to view fossil fuel as it has eventually come to view tobacco: as a product that Americans are addicted to, with enormous social cost. And CleanTech may emerge as the cure for that addiction. Much as we long accepted smoking, even though we suspected that it was not good for us, we continue to use fossil fuels, even though we suspect and fear that fossil fuels are creating problems all around us. Tobacco use is in steep decline today thanks to the universal acceptance of the scientific research that smoking is hazardous to health. But isn't the science similarly available for CleanTech? Isn't coal polluting? What about the Deepwater Horizon disaster, just last year?

Fossil fuels and tobacco share what is known as externalities — the real costs emanating from the use of a product or resource that are not paid for or attributed directly to the product's usage — i.e., cost that we do not pay at the gas pump or when we turn on our air conditioners. The externalities ascribed to tobacco, the costs associated with the use of tobacco — mostly health related — are not part of the price of a pack of cigarettes. It is the fear that these "external" costs of tobacco usage would eventually be added to the tobacco companies' cost of doing business, making their product no longer profitable, which convinced tobacco companies to accept regulatory limitations on tobacco use. These limitations led to decline of the use of tobacco.

Can CleanTech lead to the demise of our use of fossil fuel in the same way? Can we apply this model — including all costs (including all externalities) of power (nuclear, fossil fuel) into the cost when the consumer fills up at the gas station or pays an electric bills — to CleanTech? Not exactly. We do possess much data showing that virtually all the traditional sources of energy have significant negative externalities that are not factored into the cost of their usage. Can we depend upon the political or legal system to advance the cause of CleanTech. Currently, the externalities associated with our current energy sources though in plain sight, have traditionally been offloaded downstream through public policy — that is, taxes and subsidies.

For example, roads to a new coal mine are paid for not by the mine owners but by local government from the tax rolls. A recent paper<sup>1</sup> from the Center for Health and Global Environment at the Harvard Medical School

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<sup>1</sup>[http://www.cleanenergyaction.org/sites/default/files/costofcoal\\_epst\\_ein021711.pdf](http://www.cleanenergyaction.org/sites/default/files/costofcoal_epst_ein021711.pdf)

concluded that coal based externalities could top \$500 billion per annum in the US alone. If these costs were rolled into the price of coal generated electricity, coal would become significantly more expensive than either wind or solar. But our taxes would be significantly lower!

Petroleum has similar externality issues. The recent Deepwater Horizon spill was of such unprecedented proportions that it will likely eclipse the 20 years it has taken to sort out the Exxon Valdez spill. The attendant potential litigation, the ultimate roll call of damage, and the scope of final insurance recovery are all unknown at this time."<sup>2</sup> There is "no way to put this in historical context because we have never faced anything like this before"<sup>3</sup> Will there be more such disasters? The Deepwater Horizon was not the first such disaster, it's merely the latest. Chevron has a rig 20 miles in deeper waters called Blind Faith.<sup>4</sup>

Further, like other clean-up efforts, our tax system will permit BP to deduct much, if not, all of its cleanup expenses. The net effect is that the tax payers will be paying for some portion of BP's cleanup.

Our need for petroleum is so overwhelming that the petroleum industry is virtually guaranteed immunity. Just recently, we have had a spate of oil pipeline ruptures. A petroleum pipeline in Montana burst spilling over 40,000 gallons of crude into the Yellowstone River. Experts from Exxon and the Federal government concluded that the spill caused no problems. Is that really possible? More recently the company reported it will cost \$40 million to clean up. Another pipeline oil spill, albeit 20 times larger, in a 35 mile stretch of the Kalamazoo River is now projected to cost over \$500 million.

In the past 20 years pipeline issues have led to more than 100 million gallons of crude spilled in the US. "Pipeline operators reported recovering less than half of all hazardous liquids spilled over the last two decades, according to federal records. And the ratio is not improving: after recovering more than 60 percent of liquids spilled in 2005 and 2006, operators recovered less than a third between 2007 and 2010."<sup>5</sup>

One CleanTech response to the issue of externalities is solar energy, which has been understood for over 100 years, but slow to develop. Recently, programs have been created, such as Solar Renewable Energy

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<sup>2</sup> [http://en.wikipedia.org/wiki/Deepwater\\_Horizon#Aftermath](http://en.wikipedia.org/wiki/Deepwater_Horizon#Aftermath)

<sup>3</sup> [http://en.wikipedia.org/wiki/Deepwater\\_Horizon#Aftermath](http://en.wikipedia.org/wiki/Deepwater_Horizon#Aftermath)

<sup>4</sup> <http://green.blogs.nytimes.com/2010/06/17/on-a-wing-and-a-prayer-chevrons-deep-well/>

<sup>5</sup> <http://green.blogs.nytimes.com/2010/06/17/on-a-wing-and-a-prayer-chevrons-deep-well/>

Certificates (“SREC”), a popular financial instrument used to promote solar energy. SRECs are provided to individuals or entities that produce solar energy and are a means to sweeten the return and, thus, encourage more solar installations. SREC programs are currently available in Delaware, Massachusetts, Maryland, New Jersey, Ohio, and Pennsylvania. New York is now contemplating such a program as well.

But the question remains: what will be the price of oil if, in fact, the industry is required to pay fully for these externalities? The Cleantech industry needs to do a better job explaining these externalities to the American people. Like ex-smokers, whose survival odds increase when they give up their habit, our society can recover from its addiction to fossil fuels. Over time, capital formerly tied up bolstering a costly fossil fuel powered energy supply system will be freed up for other purposes. Further, instead of the belt tightening associated with sustainability, we believe our economy will experience a huge spurt of growth and innovation if we can switch to CleanTech on a scalable level. The CleanTech transformation is a technological opportunity that we cannot afford to miss.

Construction law practitioners should and can be part of the process furthering the movement towards a Cleantech economy. For example, practitioners can help develop contracts that establish performance requirements, commissioning and testing standards, and allocate the risk of solar energy installations among the land owner, developer, the solar installer and manufacturer of the panels. Expansion of state programs utilizing SRECS are efforts which practitioners should be aware of and may consider participating in.

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## Trenchless v. Hallen: No Damages For Contemplated Delays

By Ariel Weinstock, Esq.

Delay is, or at least should be, a recognized and expected possibility on virtually all construction projects. Owners can delay or be delayed by their general contractors by failing to obtain permits, provide needed specifications, drawings or selections, and/or complete one or more aspects of a project in a timely fashion. General and trade contractors may be delayed by the failure of other workers on the job site to secure needed materials and equipment or complete a distinct portion of the project to which the other contractors must connect their work. Accordingly, a properly developed contract for construction should address what actions and omissions may constitute a delay and whether, or what type of, delays are compensable (meaning that the party suffering the delay would be entitled to additional compensation).

In anticipating construction delays, owners, in contracts with general contractors, and general contractors, in contracts with subcontractors, often seek to shift the risk of a delay on the general contractors and subcontractors, respectively. This is commonly accomplished by including a “No Damage For Delay” clause in the construction agreement. As its name implies, these clauses provide that the contractor experiencing the delay is not entitled to additional compensation merely due to a project delay.<sup>1</sup>

In *New York Trenchless, Inc., v. Hallen Construction Co., Inc.*, 82 A.D.3d 850, the Appellate Division, Second Department, confirmed that, in New York, “Clauses in construction contracts which bar contractors from recovering damages for delay in the performance of the contract are generally valid and enforceable.” *Trenchless*, at 851.

In *Trenchless, Hallen Construction Co., Inc.* (“Hallen”), was hired by nonparty KeySpan Electric (“Owner”) to install approximately 46,000 feet of underground transmission cable on Long Island. Hallen entered into a subcontract with New York Trenchless, Inc. (“NYT”), for drilling services at several locations along the cabling project. After experiencing delays on the project NYT submitted a claim for additional compensation which was denied by Owner. Thereafter, NYT brought suit against Hallen to recover its damages. The trial court and Appellate Division held for Hallen citing the subcontract which contained a no damages for delay clause.

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<sup>1</sup> Typically, however, these provisions will allow for an extension of the contractor’s time to complete its performance of the work required under the construction agreement.

The Appellate Division noted in its decision that there are four (4) exceptions to the general rule that no damage for delay clauses are enforceable. Namely:

- “(1) delays caused by the contractee’s bad faith or its willful, malicious, or grossly negligent<sup>2</sup> conduct,
- (2) unanticipated delays,
- (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and
- (4) delays resulting from the contractee’s breach of a fundamental obligation of the contract.”

*Id.* citing *Corinno Civetta Constr. Corp. v City of New York*, 67 N.Y.2d at 309. With respect to the second exception to the general rule, the Appellate Division held that the subcontract “did contemplate the possibility of ‘latent, concealed or subsurface physical conditions’.” *Id.* at 852

Thus, the prospect of delays on a construction project should be addressed between the project team members and the impact and burden of compensating for delays should be memorialized in the construction agreement. If the parties agree to a no damage for delay clause in the construction agreement, the parties should be mindful that: (1) the contract must identify the types of anticipated or possible delays that may be experienced so as to avoid nullification of the provision due to the “uncontemplated delay” exclusion; and (2) such clauses will be enforced in New York.

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<sup>2</sup> Though the courts have held that the exclusion to a no damages for delay clause turns on a “grossly” negligent standard, drafters of construction agreements should be careful to note that New York’s General Obligations Law §5-322.1, prohibits a promisee in a construction agreement from being indemnified against the promisee’s own negligence; a lower threshold of fault than “gross” negligence.

## **Goldenberg v. Westchester County Health Care Corp.: Some Mistakes Just Cannot Be Fixed.**

By David Joyandeh

While New York law gives practitioners flexibility when an error occurs, some requirements are so integral to the legal process that when they are not done properly the courts are not as forgiving as some would hope. One such example is discussed in *Goldenberg v. Westchester County Health Care Corp.* 16 N.Y.3d 323 (2011)

As discussed in *Goldenberg*, the plaintiff commenced a special proceeding to file a late notice of claim for a medical malpractice claim that included a proposed complaint, which was granted. The plaintiff thereafter served onto the defendant the notice of claim with a summons and complaint, neither of which having an index number due to the plaintiff's failure to purchase one. In addition, the served complaint had differences from the proposed complaint. The plaintiff later filed an affidavits of service that displayed the index number for the special proceeding.

After the statute of limitations had lapsed, the defendant moved to dismiss the lawsuit as untimely. Consequently, the plaintiff cross-moved for an order permitting him to file a summons and complaint *nunc pro tunc*. Basing its decision on CPLR §2001, the Supreme Court denied the plaintiff's cross motion. Thereafter, the Appellate Division granted leave to appeal and it was affirmed by the Court of Appeals.

In its decision, the Court of Appeals focused on the Supreme Court's application of CPLR §2001 as amended in 2007. The statute states that "At any stage of an action, including the filing of a [...] summons and complaint [...] the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected" (CPLR §2001). The court specifies that the statute was meant to allow trial judges to fix non-prejudicial defects in the filing process and was not meant to excuse a complete failure to file within the statute of limitations.

The court highlights that in *Goldenberg* the plaintiff never actually filed a summons and complaint. The closest the plaintiff came was filing a proposed complaint attached to the petition seeking permission for filing a late notice of claim. Since there was an absence of a summons, there was a complete failure to file within the statute of limitations and CPLR §2001 does not allow a trial judge to disregard this error. Therefore, the Court of Appeals affirmed the decision denying the plaintiff's cross motion. While attorneys are human and errors are likely to occur, it seems that the court decided

that limits must be set and not all mistakes can be forgiven.

Interestingly, the Court of Appeals avoids addressing the issue of how the lower courts would treat the differences between the proposed and served complaints had a summons been filed. *Goldenberg* cites the Introducer's Memorandum for the bill that amended CPLR §2001 emphasizing that this statute is meant to clarify a mistake of filing as opposed to mistake in what is actually filed (*see* Senate Introducer Mem. in Support, Bill Jacket, L 2007, ch 529, at 5-6). The court seems to be informing attorneys that the trial judges do not have the power to fix inaction, rather only incorrect actions. Thus, one could argue that trial judges would have more latitude in such a hypothetical situation since there was filing, albeit an incomplete one.

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