// CASES & POINTS
ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.
VOLUME XI, ISSUE 1 SPRING, 2008

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OPENING STATEMENT

As usual, construction accidents continue to give rise to much appellate litigation, often with unpredictable results. This past calendar quarter is no exception. Two decisions of New York's highest court, are illustrative. The first, Sanatass v. Consolidated Investing Company interpreting New York's Labor Law, makes owners of property strictly liable for accidents arising out of work performed for their tenants without their knowledge or consent and even in violation of the provisions of their leases. The second, Worth Construction Co. v. Admiral Ins. Co. limits the meaning of "arising out of" contractors' work for the purpose of determining whether an owner or general contractor is entitled to additional insured coverage under a subcontractor's policy. Out lead article analyzes these cases in detail.

Construction Conundrums: Recent Court of Appeals Decisions on Labor Law Liability and Additional Insured Coverage.

By Michael E. Gorelick

• On April 24, 2008, New York's Court of Appeals further extended the already draconian provisions of New York's Labor Law with respect to an owner's vicarious liability for injuries to workers at their premises. In Sanatass v. Consolidated Investing Company, 10 N.Y.3d 333 (2008), a divided Court of Appeals found that the strict liability provisions of the Labor Law relating to owners' liability extended to work performed for a tenant without the owner's knowledge or consent.

Sanatass concerned liability for injuries suffered by Christopher Sanatass when he and a co-worker were hoisting a one-ton air conditioning unit to the ceiling of leased space in New York City. When a manual lift failed, the unit dropped approximately four feet and struck the plaintiff, severely injuring his back.

Plaintiff brought suit in Supreme Court, New York County under New York's Labor Law § 240(1) [the "Scaffold Law"]. The building's owner, Consolidated, moved for summary judgment arguing that it could not be held liable under that section of New York's Labor Law because its tenant, C2 Media, had hired the company that employed Mr. Sanatass without Consolidated's knowledge or approval.

This motion was granted, and affirmed 3-2 by the Appellate Division, First Department.

The Court of Appeals, in a 5 to 2 decision, held that a property owner cannot escape liability by not knowing or having control or work ordered by its tenant. It held that Labor Law § 241 still "clearly places the burden on the owner should a violation of the statute proximately cause injury".

In writing for the majority of the divided Court, Judge Victoria Graffeo wrote that:

> "At bottom, Consolidated asks us to hold that an owner may insulate itself from liability by contracting out of the Labor Law. . . We decline its invitation to engraft this new exception onto the statute. To allow owners to do so by the simply expedient of a lease provision . . . would eviscerate the strict liability protection ordered by the Labor Law."

Judge Robert Smith, writing for the dissent, opined that the majority's decision "unwisely and unnecessarily increases the already heavy burden that Labor Law §240(1) places on New York property owners." He went on to say:

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"I do not see how the statutory goal of preventing work place accidents is advanced by holding a landlord liable in a situation like this. . . what could anyone expect the landlord to do to prevent the accident, other than what it did?"

However, unless changed by the Legislature, a project owner can now be held strictly liable under the Labor Law for unauthorized, impermissible repairs or alterations conducted by tenants without its knowledge and against its instructions.

• Insurance coverage for a Labor Law claim (not the defendants' liability) was at issue in a decision rendered on May 1, 2008. The Court of Appeals was asked to consider whether a worker's injury "arose out of" the subcontractor's work, so as to entitle the general contractor to additional insured coverage under the subcontractor's policy.

In Worth Construction Co., Inc. v. Admiral Insurance Company, 10 N.Y. 3d 411 (2008), plaintiff was the general contractor for a project involving the construction of an apartment complex. Worth subcontracted with various trade subcontractors, each of which presumably obtained general liability insurance providing limited additional insured coverage for Worth. Pacific Steel agreed to fabricate and install a staircase consisting of steel pan stairs and handrailings. Each individual stair was comprised of two "stringers" welded to a steel pan. Pacific was to install the stairs and then turn the project back over to Worth and its concrete subcontractor to fill the pans. Once the concrete had been poured and the walls erected around the stairs, Pacific was to return to the site to complete its portion of the project by affixing the handrailings to the walls.

Enter Michael Murphy, an ironworker employed by another subcontractor, Fasciano Iron Works. During this interim period, after the stairs had been installed but before the walls had been raised, he sustained injury when he slipped on fireproofing that had been applied to the stairs by yet another subcontractor, Central Enterprises. Pacific played no role in either contracting for or applying the fireproofing, nor did it subcontract with Fasciano for the performance of any work at the site.

Murphy commenced a Labor Law action against the owner of the building project and the general contractor, Worth. Because the Complaint alleged that Murphy had been injured on the staircase installed by Pacific, Worth requested a defense in the Murphy action from Farm Family Insurance Company, the insurer of the subcontractor, Pacific, on the ground that Worth was an additional insured in the Farm Family policy. The additional insured endorsement of the Farm Family policy provided that Worth and the owner were covered as additional insureds "but only with respect to liability *arising out* of [Pacific's] operations or premises owned or rented to [Worth]". When Farm Family refused to undertake its defense, Worth commenced a third-party action against Pacific seeking contribution, indemnification, and also a separate declaratory judgment against Farm Family, asserting that it was entitled to defense and indemnification as an additional insured under Farm Family's policy.

Initially, the Supreme Court granted summary judgment to Worth, declaring that Farm Family must defend and indemnify Worth in the Murphy bodily injury action. But while the motion for summary judgment in the declaratory judgment was pending, Pacific moved for summary judgment against Worth in the Murphy action. In response to that motion Worth conceded that its negligence claim against Pacific was without merit and should be dismissed, and consequently the Murphy court did just that. Farm Family then renewed its motion for summary judgment in the Worth declaratory judgment action, arguing that Worth's concession the Murphy action that Pacific was not negligent constituted an admission that the injury at issue did not "arise out of" Pacific's work or operations.

The Supreme Court agreed, finding that Worth's concession that Pacific was not negligent established as a matter of law that the injury did not arise of out Pacific's operations, and it reversed its prior Decision. The Appellate Division reversed, finding that the terms of the additional insured endorsement of the Farm Family policy did not require a finding of negligence against Pacific for Worth to be entitled to additional insured's coverage. By a 3 to 2 decision, it held that the fact that the injury occurred on the staircase installed by Pacific was sufficient to trigger additional insured coverage for Worth under the Farm Family policy and reversed its prior Decision.

On appeal, the Court of Appeals reversed, holding that "once Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded the staircase was merely the situs of the accident. Therefore, it could not longer be argued that there was any connection between [the] accident and the risk for which coverage was intended".

As a result of the Worth case, where an owner or general contractor seeks additional insured coverage under a subcontractor's policy, if there is no question that the subcontractor was not negligent (e.g.: its work has been completed and it is no longer present at the site; the accident clearly results from the work of another contractor, not hired or subcontracted to by the named insured, etc.) additional insured coverage will not be available. However, where the named

insured's negligence remains at issue, the additional insured coverage has been triggered and the additional insureds will be entitled to a defense in the action.

The Worth case may have important implications for parties litigating declaratory judgment actions seeking additional insured coverage under a subcontractor's policy. For more information on the Sanatass or Worth cases, or to discuss Labor Law liability and insurance coverage issues in general, contact Michael Gorelick at mgorelick@agfjlaw.com.

Will Governor Sign His Own "Late Notice" Bill On Time? By Thomas R. Maeglin

We reported last year on a Bill aimed at changing New York's "no-prejudice" rule, relating to an insurer's right to deny liability claims based upon an insured's failure to provide timely notice of an occurrence or claim. (See *Cases & Points*, Summer 2007, Volume X, Issue 3). Following former Governor Spitzer's veto of that Bill, a Governor's Program Bill was drafted, introduced in the legislature, and finally, passed by both houses on June 23, 2008. (See Senate Bill S 8610.) Similar to the 2007 bill, this legislation has the following features:

- Prejudice Requirement: Policies insuring against liability for bodily injury or property damage would have to include a provision that failure to give notice "required to be given by such policy within the time prescribed therein ... shall not invalidate" any claim, unless the delay has prejudiced the insurer. (Claims-made policies may require notice during specific periods of time.)

- Definition of Prejudice: Insurers are only prejudiced when their ability to investigate or defend the claim has been impaired.

- Burden of Proof—First 2 years: The insurer has the burden of proving prejudice if notice has been provided "within two years of the time required under the policy."

- Burden of Proof—After 2 years: If notice is provided more than two years after the time required, the claimant (insured, injured, or other) has the burden of proving that the insurer has *not* been prejudiced.

- Direct Action against Insurer by Injured or Wrongful Death Plaintiff: If the insurer has not "initiated" an action, naming the claimant as a party, within sixty days after a denial on the basis of late notice, the claimant can commence an action directly against the insurer "in which the sole question is the insurer's disclaimer or denial based upon failure to provide timely disclaimer or denial based upon failure to provide timely notice." The bill does not require that the claimant first obtain a judgment against the insured.

Confirmation of Existence of Policy and Limits: Claimants may demand confirmation that the insured has a liability policy, and what the limits of that policy are, and insurers have sixty days to provide their response. If the insurer lacks information needed to confirm coverage, it has 45 days to inform the claimant. If the claimant then provides the information, the insurer must give its response within 45 days.

Effective Date: 180 days after enactment. It would apply only prospectively.

Under the New York State Constitution, the Governor is to sign or veto a bill within 10 days, while the legislature is in session. (See Constitution Art. 4, § 7.) But Senate Bill S 8610 passed both houses of the legislature on the day it adjourned, and this means that the bill cannot become law without the Governor's signature in 30 days. (See id.) If he takes no action, the bill (in what is colloquially known as a "pocket veto") "shall not become a law". (Id.). As the origin of the bill was in the Executive branch, many believe the bill has the Governor's support; but as of this writing, there's been no approval.

What's in Your Sidewalk? Update on New York's Sidewalk Law By Steven DiSiervi

In the Summer, 2003 Issue of *Cases & Points* (Volume IV, Issue 3), we reported on the change in New York City's Administrative Code which went into effect on July 11, 2003 and which shifted sidewalk accident liability from the City of New York to landowners. In Vucetovic v. Downs, decided on June 3, 2008, the Court of Appeals was called upon to interpret this section of the Administrative Code as it related to tree wells.

To give some background, prior to the adoption of §7-210 of the Administrative Code, property owners were required by statute to maintain the sidewalks abutting their premises. Failure to do so resulted in a fine or obligation to reimburse the City for cost of repairs, but did not result in tort liability. An injured plaintiff had only Common Law remedies, and the owner was only liable if it had caused the defect that made the sidewalk dangerous. In an effort to transfer tort liability, the City Counsel enacted §7-210 "to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them – the property owner". In Vucetovic, the Court of Appeals held that for the purposes of §7-210, tree wells are not considered part of the "sidewalk" and, as such, the abutting property owner is not liable for accidents resulting from

them.

In Vucetovic, the plaintiff was walking down the street at night when he stepped into a tree well and tripped on one of the cobblestones surrounding the dirt area containing a stump of a tree cut down by the City of New York. The tree well was located in front of the defendant's building, but the well had been installed before the defendant acquired the property. The plaintiff brought action against the defendant for personal injuries, alleging that the owner had failed to maintain the sidewalk in reasonably safe condition and had thus violated Administrative Code § 7-210. The property owner,moved for summary judgment to dismiss, contending that the tree well is not part of the sidewalk as defined by the Code, thus § 7-210 did not apply. The Supreme Court granted the motion and dismissed the case. The Appellate Division affirmed and the plaintiff appealed as of right based on the two-Justice dissent.

The Court of Appeals agreed with the lower courts in interpreting that the tree well was *not* part of the sidewalk. "In reaching this result, we are guided by the principle that 'legislative enactments in derogation of common law, and especially those creating liability where none previously existed' must be strictly construed". As tree wells are not specifically mentioned in the referenced sections, they are not to be considered part of the sidewalk. The court does not believe the inclusion of tree wells was the City Council's intention due to the "silence and the absence of any discussion of tree wells in the legislative history". The court maintains that if it *had* been the City Council's intention to include tree wells, the language needed to be "specific and clear".

AGF&J Developments

AGF&J won summary judgment for its client, Gemrosen Realty Corp., in an action pending in Supreme Court, Queens County. In Baxter v. Gemrosen Realty Corp., et al., plaintiff slipped and fell in front of our client's premises allegedly due to an accumulation of snow and ice on the sidewalk.

After discovery, AGF&J moved for summary judgment dismissing the action against our client. The motion was granted by the Court (Justice Patricia Satterfield) in her decision of April 9, 2008 where she held: "Defendants made a *prima facie* showing of entitlement to judgment as a matter of law . . . by submitting evidence that there was a storm in progress at the time of the incident. (citations omitted) A party in possession or control of real property may be held liable for a hazardous condition created on its premises as a result of the accumulation of snow and ice during a storm only after a lapse of a reasonable time for taking protective measures subsequent to the cessation of the storm.

Justice Satterfield found that plaintiff had failed to raise a triable issue in opposition to the motion. Plaintiff had claimed that ice was present on the sidewalk before the incident. However, the Court found that plaintiff's contention was refuted, as a matter of law, by defendant's evidence in the form of a security camera tape of the images of the sidewalk for more than 20 hours prior to the accident which depicted the absence of ice on the sidewalk. Thus, the Court found that there was no merit to the claim and dismissed the action as against AGF&J's clients, as a matter of law. For more information about the Baxter case, please contact Leonard Kamlet at lkamlet@agfjlaw.com.

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