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Ernstrom & Dreste, LLP also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Clara Onderdonk at conderdonk@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity and Surety Reporter can also be obtained at Ernstrom & Dreste, LLP's website (ernstromdreste.com).

FIRM NEWS

Kevin Peartree, Martha Connolly, and Brian Streicher presented on "*Controlling Risk in Construction and Project Delivery Systems*" to the AGC NYS Construction Leadership Academy at a session in Rochester, New York on May 24, 2023.

Brian Streicher participated in the Isaiah House Golf Tournament at Penfield Country Club on June 12, 2023. Schuler-Haas Electric Corp. presented the event and E&D was a Bronze Sponsor.

Kevin Peartree is authoring updates to the ConsensusDocs Handbook for the 2024 Cumulative Supplement, including the addition of Chapter 22, ConsensusDocs 755: Standard Master Subcontract Agreement between Constructor and Subcontractor and ConsensusDocs 756: Standard Work Project Order (pursuant to Master Subcontract Agreement).

Todd Braggins will be a presenter at the January 2024 ABA/TIPS Fidelity & Surety Law Committee Midwinter Conference in New Orleans. He will speak regarding surety claims handling considerations related to varying contract delivery methods.

Clara Onderdonk will participate in the national Association of Legal Administrators Executive Leadership Summit, September 28-30, 2023 in San Diego, CA.

E&D is pleased to announce the addition of another professional to our legal services team. Recent Penn State graduate Gia Denaro joins us as a paralegal to assist with document management, discovery and important filings on construction and surety matters.

CONSTRUCTION RISK MANAGEMENT REPORTER

ERNSTROM & DRESTE LLP

ContrACT

FALL 2023 ISSUE 33

Carlos' Law: What You Need to Know

CAVAN S. BOYLE

The Amendment to New York Penal Law § 20.20, known as Carlos' Law, became effective in March, following the death of Carlos Moncoya, a 22-year-old worker killed in a 2015 trench collapse. Legislators sought to raise financial penalties for corporate criminal conduct like that in Carlos' case, where the fine was a mere $10,000. Thus, the heart of Carlos' Law is not so much a change to liability as it is a steep increase in fines permitted when a company is found criminally responsible for employee injuries or deaths. Fine caps were raised from $10,000 to $500,000 for felonies and from $5,000 to $300,000 for misdemeanors. The amendment, however, made other changes to know about.

A corporation is guilty under Carlos' Law when its agent, while acting within the scope of his employment, commits an offense that involves the death or serious physical injury of an employee where the corporation acted negligently, recklessly, intentionally or knowingly. "Agent" is an expansive term, though not new under the amendment, and includes any person who is authorized on behalf of the corporation/employer to direct someone else's actions.

The new law redefines the injured person from a "worker" to an "employee" apparently requiring that the person be employed by the corporation accused of the criminal conduct. This should help limit criminal liability to the direct employer, rather than potentially expanding contractor

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Wait, What? No Lien for Scaffolding?

NELL M. HURLEY

A surprising appellate decision out of New York City's First Department late last year is raising concern among construction lawyers and contractors alike. The brief opinion held that there was no mechanic's lien for scaffolding and a sidewalk shed, finding that those items were not for the "permanent improvement" of real property within the meaning of the Lien Law, and vacating the lien.[1] Scratching your head? You are not alone.

The matter arose out of a contract for façade repair work on a building required by New York City's Local Law 11. Included in the contract was the provision of scaffolds and a sidewalk shed to facilitate the façade work and to enable performance without endangering the public. The general contractor subcontracted the scaffolding scope to Intersystem S&S Corp. ("Intersystem"). This included initial installation by Intersystem, and monthly rental for the duration of the project. The building's owner made progress payments for project work to the general contractor, apparently including for the scaffolds and shed. More than a year later, the general contractor was replaced by another company that completed the façade work. Intersystem then said it had not been paid, and filed a mechanic's lien against the property.[2]

Following efforts to obtain a proper itemized statement of lien from Intersystem, the owner petitioned to vacate the lien, arguing that the lien was untimely filed and that the scaffolding and shed were not improvements under the Lien Law. The lower court granted the petition without stating its reasoning. Intersystem appealed, and the appellate court affirmed the vacatur.

While conceding that the scaffolds and sidewalk shed were necessary for the completion of the contract for façade repairs, the appellate court instead relied upon the nature of the scaffolds and shed as temporary structures to conclude that they did not qualify as "permanent improvement[s]" as required by the Lien Law. The court stated:

> "…the structures themselves effected no permanent change to the building. The ***project*** therefore falls outside the scope of labor and materials protected under the Lien Law." (Emphasis added).

Section 2(4) of the Lien Law defines an improvement for which a mechanic's lien may be filed to include:

> "…demolition, erection, alteration or repair of any structure upon…real property and any work done upon such property or materials furnished for its permanent improvement…"

New York case law is robust regarding what is considered a permanent improvement, in particular within the context of fixtures and machinery, often turning on the issue of the intent of the parties as to permanency at the time of installation.[3] Under this strict analysis, the "project" of the scaffolds and shed is viewed separately from the contracted façade repairs, and fails to qualify.

But the court's reasoning does not consider the scaffolding and shed as a component of the obviously permanent façade repair work which, under the statute's language, could constitute "work done…or materials furnished ***for*** [the real property's] permanent

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improvement [façade repair]." (Emphasis added). Perhaps even more importantly, the court's analysis completely ignores the further provision of Lien Law § 2(4) which provides that improvement under the statute includes "the reasonable rental value for the period of actual use…of equipment…in connection with the… repair of any real property…" The scaffolds and sidewalk shed here should qualify for the lien under this language alone.

There is inherent tension in the Lien Law, as it is strictly construed (since it was created by statute in derogation of common law) and yet liberally applied (to achieve its purpose of security for contractors and laborers). Prior to this case, New York lien rights for scaffolds and sidewalk sheds was not specifically addressed, and this court's strict construction may not be the final word. And while other appellate division courts are not bound by this First Department ruling, and could reach a contrary result, lower courts in other departments must follow it for now. As such, liens that claim for scaffold or shed costs on the face of the lien could be subject to immediate challenge in a summary discharge proceeding under Lien Law § 19(6). Liens for such costs already asserted in a lien foreclosure action, or as part of a larger overall lien, could potentially be reduced at trial or on motion. The decision's focus on the items' temporary character as determinative could also spell future trouble for other materials or equipment that are not specifically incorporated into a permanent improvement. E&D

1 *W 54-7 LLC v Intersystem S&S Corp.*, 210 AD3d 454 [1st Dept 2022].

2 There may have been nothing due to the general contractor at the time Intersystem's lien was filed, an additional basis for vacatur apparently not addressed.

3 The court relied on cases that vacated liens for modular workstations and a rooftop cogeneration system, for example, which turned on the parties' intent.

CONTINUED "CARLOS' LAW: WHAT YOU NEED TO KNOW"

liability to all workers on a project.[1] In addition, "employee" is defined broadly per the statute to include, in effect, all who are paid by a business or private party (the corporation-employer), regardless of exact label or employment details.

Carlos' Law applies only to offenses that cause death or "serious physical injury,"[2] requiring a substantial risk of death, serious disfigurement, serious health impairments, or the loss of the function of a bodily organ. The law does not cover serious injury to mental health.

Under the new law, a corporation-employer acts criminally if it "acts negligently, recklessly, intentionally, or knowingly." Allegations of negligence or recklessness are the most common. Courts explain this distinction between them: recklessness requires the contractor to be aware of and consciously disregard a substantial unjustifiable risk, while criminal negligence occurs when a contractor fails to perceive such risk.

Prosecutor's offices continue to have all tools available under New York's Penal Law, not just Carlos' Law, but some worry the increased fines (which go to the State) will be used to more aggressively investigate and prosecute jobsite criminal violations. In light of these risks, what can a contractor do to increase worker safety and minimize its potential criminal liability? Construction industry leaders agree that this likely includes actions contractors are already taking, or should be, but "more and better."

1. Set the Tone: Leadership must set clear expectations at the beginning of the job: employee safety is the ultimate priority and cutting corners at the expense of safe work sites will not be tolerated.

2. Communicate: Consistent, effective communication and documentation regarding all things safety-related is imperative. Use direct channels of communication between each level of project management to avoid conflicting guidance and job site confusion on safety policy, implementation and practice.

3. Document: Keep accurate logs and sign in sheets to show which of your employees are on the job every day. Prepare safety incident reports to thoroughly document all violations and record the resolution to each incident, identifying each step taken.

4. Discipline: Safety violations by employees must be disciplined, providing incremental consequences where conduct reoccurs. Such discipline both corrects the wrong and creates evidence demonstrating the company's compliance with Carlos' Law, and other safety laws.

5. Sub Safety: Where subcontractors or their employees violate safety rules, notify the sub in writing and consider using a back charge. This documents company efforts to correct the violations, and provides incentive for subcontractor-employers to swiftly correct their safety violations.

6. Have a Plan: If there is a death or serious injury on a job, an emergency plan should be in place for securing the area, notifications, investigations, reports, response to police or District Attorney, and a possible press release.

Unlike some types of liability, a contractor cannot "contract away" the criminal liability set forth in Carlos' Law.[3] Fortunately, criminal prosecutions against contractors for workplace deaths and injuries are fairly uncommon. But the construction industry is inherently dangerous, and the new law serves as a meaningful reminder that worker safety must be paramount. E&D

1 Even so, liability has continued to be extended to upstream parties for civil liability through such means as the Wage Theft Act, and it is likely the aim of those enforcing Carlos' Law to impose criminal liability whenever they possibly can.

2 Prior law stated "injury."

3 It may, however, be possible to expand such potential liability contractually or by otherwise taking on additional responsibility for safety obligations.

When a PLA Pay Mandate Means Payment for Not Working

MARINA DE ROSA

Project Labor Agreements ("PLAs") are increasingly required on construction projects, which means specific, and perhaps unfamiliar, labor rules and regulations must be followed by contractors. Terms regarding important factors impacting the job also come from other documents, rules, and laws not always directly referenced in the contract documents. One contractor, Lanmark Group Inc. ("Lanmark"), found out the hard way that a PLA-specific labor payment rule, combined with noise restrictions and limited hours of operation imposed by a non-owner entity, meant disaster on a downstate school renovation project.[1]

Lanmark was awarded an $8 million contract on a public school construction project with the New York City School Construction Authority ("SCA"). Lanmark knew the job was subject to a PLA requiring union wages. It also knew that work was to be performed outside of school hours, starting after 3 p.m. weekdays. Noise restrictions were a part of the project since the work was to be performed in a residential neighborhood. The contract further contained a standard "compliance with laws" provision.

Lanmark learned that the NYC Building Code required permits from the NYC Department of Buildings ("DOB") to work after 6 p.m. and on weekends, and obtained them. Lanmark also submitted the required noise restriction plan. Even so, multiple noise complaints were received, leading the DOB to restrict Lanmark's permit hours such that workers were only able to work partial shifts for many weeks. Lanmark also learned that the PLA required payment to workers for 8 full hours each day, even when they actually worked less.

Lanmark complained to SCA that the DOB permit limitations would significantly impact the time necessary to complete the project and cause it to pay tradespeople for hours not worked, among other things. The parties, including DOB, negotiated some measures to address the hours of work and noise issues, but not the payment mandate, and hours remained reduced.

After timely substantial completion of the project, Lanmark submitted a notice of claim to SCA, and thereafter filed suit for over $800,000, for "additional costs incurred due to inefficiency in performing contract work."[2] SCA moved for summary judgment, citing the contract's "no damage for delay" provision[3] and arguing none of the four exceptions to its enforcement applied.[4] The lower court granted SCA's motion and Lanmark appealed.

Lanmark argued primarily that the inefficiencies were uncontemplated by the parties in the contract, and thus not subject to the clause, because "the loss of time created by mandatory reduction in man-hours are not mentioned in the contract." The appellate court disagreed, finding that, although not explicitly spelled out, the intersection of the contract PLA pay requirement, the restriction of construction to non-school hours, and the need for a discretionary DOB permit for work after 6 p.m. made clear that Lanmark was aware that there was at least the possibility that tradespeople would be able to work as little as 3 hours a day.

The court rejected Lanmark's argument that SCA breached a fundamental obligation of the contract that project workers be allowed to work 8-hour shifts as a misinterpretation of the PLA terms, which the court noted "required only that they be paid for an 8 hour shift." Similarly, the court was dismissive of Lanmark's argument that SCA breached a fundamental obligation by requiring that contractors follow the PLA pay mandate. Although the PLA pay mandate was imposed by SCA, the court said, Lanmark agreed to all PLA terms by entering into the contract. Since none of the exceptions applied, the "no damage for delay" provision barred Lanmark's delay claim action, held the court, and summary judgment dismissing the action was affirmed.

Contractors should heed the warnings evident in this case. Be sure to carefully review the terms of the applicable PLA and implicated laws, regulations, and codes for project work at the time of bid. As Lanmark learned, for the purpose of a "no damage for delay" clause, "contemplation" under the contract is not limited to obvious contract terms but can extend to conditions for which the contractor is responsible, whether specifically mentioned or not. E&D

1 *Lanmark Group, Inc. v New York City School Constr. Auth.*, 214 AD3d 524 [1st Dept 2023].

2 Lanmark also asserted the same damages as a claim for extra work, which the court later found "unavailing" without specifically addressing.

3 Under New York law, claims that are based on alleged inefficiencies in performing construction work are typically considered delay claims.

4 There are four exceptions to such a provision: 1) The delays were caused by the owner's bad faith and/or willful, malicious, and grossly negligent conduct: 2) The delays were uncontemplated: 3) The delays were so unreasonable they constituted intentional abandonment of the contract by owner; and 4) The delays resulted from owner's breach of a fundamental obligation of the contract.

E & D professionals attended a JBX (Junior Builders Exchange) Intern Summer Jobsite Series event at Rochester's Strong National Museum of Play expansion project, hosted by LeChase Construction Services, LLC in June. L to R, partner Brian Streicher, paralegal Gia Denaro, and associate attorneys Marina De Rosa and Cavan Boyle.