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Construction Law Update

In This Issue:

Let's be reasonable

The Louisiana Private Works Act (Louisiana Revised Statute 9:4801, *et seq*.), at section 4822G thereof, provides the list of requirements for a Private Works Act lien document. Those requirements are that the lien be in writing and signed by the claimant or its representative, shall provide an adequate property description of the immovable property where the work was performed or materials supplied, shall state the "amount and nature" of the obligation giving rise to the claim and must "reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, material supplied, or services rendered." Interestingly, the Private Works Act does not require the lien to be notarized, whereas similar claims under the Louisiana Public Works Act require notarized forms, La. R.S. 38:2242B (although the other requirements for lien documents set forth above are not present in the Public Works Act statutes).

The requirement for "reasonable itemization" of the elements has seldom been the linchpin for rejecting a lien claim, as courts seem to do what they can to preserve lien claims of subcontractors and suppliers – notwithstanding the rule of strict construction of lien laws against the claimant. Empirically, this has been true even when liens have simply declared that "labor and materials" were provided to a project.

Yet, in Jefferson Door Company, Inc. v. Cragmar Construction, L.L.C., 2012 La. App. LEXIS 67 (4thCir.), the Court of Appeal affirmed the trial court dismissal of a lien which provided certain discrete categories of items furnished by the supplier but not an exact listing of the items. The lien itself described "certain materials consisting of but not limited to, trim, millwork, etc." but did not describe the materials further. The Court of Appeal declaredthat the foregoing general classifications "[c]learly" do not satisfy "the requisite reasonable itemization of materials for purposes of the statutory requirements." The court appeared to be swayed in part also by the fact that an "Itemized Statement of Account" attached to the lien declared that "various materials" would be "more particularly itemized on the attached invoices," although the invoices apparently were never attached to the lien or the statement of account.

The Louisiana Supreme Court hath spoken . . .not!

In our Summer 2011 newsletter we reported on the appellate court case of Glencoe Education Foundation, Inc. v. Clerk of Court and Recorder of Mortgages for the Parish of St. Mary, Louisiana, 65So.3d 225 (La. App. 1st Cir. 2011), on the topic of payment bond surety liability in the face of pay-if-paid clauses.

In Glencoe, a subcontractor on a Louisiana public works project brought suit against the general contractor's statutory payment bond surety for the balance of the subcontract sum. The generalcontractor (defending the surety on a tender of defense) defended itself and the surety on the basis of a pay-if-paid clause in the subcontract, and corresponding nonpayment by the public owner. The court recognized the validity of the pay-if-paid clause,

but allowed the clause to serve as a defense only for the general contractor. The surety was cast in judgment to the subcontractor.

A writ of certiorari from the Louisiana Supreme Court was sought by the defendants, and an amicusbrief of The

Lloyd N. Shields
Norman A. Mott
Daniel Lund,III
Elizabeth L. Gordon
Andrew G. Vicknair
Adrian A. D'Arcy
Jeff K. Prattini
Ashley B. Robinson
Jessica R. Derenbecker
Shailendra U. Kulkarni

The lawyers of
Shields Mott Lund L.L.P.

Surety & Fidelity Association of America was filed in support of the appeal. The Louisiana Supreme Court has since denied the writ, without any reasons given. Glencoe Education Foundation, Inc. v. Clerk of Court and Recorder of Mortgages for the Parish of St. Mary, Louisiana, 73So.3d 383 (La. 2011).

The principal concern with the ruling is the intermediate appellate court's acknowledgment but concurrent apparent disregard of the nature of the surety-principal relationship (that is, that the surety's liability is coextensive with that of the principal/general contractor), as well as the normal ability of the surety to assert nearly any defense to the claimthat its principal can assert. This is not necessarily the final word on the matter, as, by law, writ denial by the Supreme Court does not stand for that Court's adoption of the holding of the Court of Appeal (entailing, also, that state district courts and state courts of appeal outside of the Louisiana First Circuit are not necessarily bound by the ruling of the First Circuit).Nonetheless, the First Circuit opinion stands at a minimum as persuasive authority on the topic.

No particular plans

On a public works dredge project in South Lafourche Parish, the name of the presumptive low bidder did not appear on the list of parties which, according to a stated requirement of the bid documents, obtained copies of the project plans and specifications from the engineer retained by the public owner's levee district. At the bid opening, the public entity, noting the discrepancy, refused to open the bid of the contractor. Seeking to determine the propriety of rejecting the low bidder, the public owner petitioned the Louisiana State Attorney General on the matter.

Noting that the Louisiana Public Bid Law (Louisiana Revised Statute 38:2211, et seq.) is "sui generis" (i.e., unique) and thatthe laws for public bids are to be strictly construed and not extended "beyond the dictates of the statute," the Attorney General, in its Opinion Number 11-0177,opined that the rejection of the bid was improper. According to the AttorneyGeneral, although the Louisiana Public Bid Law "specifically allows public entities to require attendance at a mandatory pre-bid conference as a condition for bidding," no similar provision exists wherein a public entity may require potential bidders to obtain the documents from the public entity's engineer. As such, the AttorneyGeneral found that "the failure to comply with such a requirement cannot be used as the basis for rejecting a bid."

Punt blocked and returned

Trial courts routinely refer to arbitration claims filed in court if there is an arbitration clause in a related agreement which speaks in any way whatsoever to the matter before the court. The very whiff of an arbitrationclause often entails that entire matters in litigation are stayed and sent to arbitration.

The decision in A&A Mechanical, Inc. v. Satterfield and Pontikes Construction Group, LLC, 2012 La. App. LEXIS 13 (4thCir.), perhaps signals a departure of sorts from the foregoing In A&A, the appellatecourt – on separate claims stemming from the same construction project – partially overruled the trial court, declaring that some claims of the plaintiff were properly destined for arbitration, but others were not.

In the case, a subcontractor brought various subcontract claims against the general contractor for nonpayment, but also asserted tort claims against the general contractor's construction manager, including claims for unfair trade practices and tortious interference with contract (based upon alleged actions of the construction manager ranging from inappropriate to illegal behaviors). The general contractor filed an exception of prematurity based on the arbitration clause in the operative subcontract, seeking to move all matters to arbitration. The exception was granted by the trial court, and the subcontractor appealed.

The Court of Appeal examined the subcontract arbitration clause closely in determining that the tort claims against the construction manager were properly brought in court and were not subject to arbitration. The court cited one of its earlier decisions wherein it recognized that certain broadly defined arbitration clauses – including one which called for arbitration of, "any and all claims, issues or disputes of any nature arising out of this contract . . . to include claims under tort law . . . " – might require arbitration of the subcontractor's claims against the construction manager. However,finding the arbitration clause in the A&A subcontract to be more narrowly defined

(specifying arbitration simply for claims "relating to this Subcontract . . ."), the Court of Appeal returned the tort claims against the construction manager to the state court for further proceedings – finding that those claims did not "relate" to the subcontract.

Dance with the one that brung ya

In Louisiana an insured party may have the right to choose its own attorney when the insurer is contesting coverage and agrees to defend the insured only under a reservationof rights. The rule is discussed in the case of Belanger v. Gabriel Chems., Inc., 787So.2d 559 (La. App. 1st Cir. 2001).

Belanger v. Gabriel Chems., Inc., 70750-2-I (Ct. App. 1st Cir. 2001).

When an insurer contests coverage but nonetheless has an obligation to defend triggered by claims asserted against the insured, the insurer must provide separatecounsel to defend the interests of the insured. Any efforts of the insurer tocontest coverage through use of an attorney must be by a different attorney.

In the Belanger case, the Court of Appealsheld that under the facts of the matter, attorneys offered up by the insurer to defend the insured – by virtue of their ongoing attorney-client relationship with the insurance company – might be materially limited in their ability to defend the insured (including defending the insured against the insurer's coverage defenses) because of the ongoing relationship. At the same time, the insured would not consent to be representedby the proposed attorneys.

In our firm's experience, many insurance companies do not oppose the insured's request under the foregoing circumstancesto hire its own lawyer at the expense of theinsurer, particularly if the independently selected attorneys agree to the rates normally paid by the insurance company.

Surety Decisions and Non-Louisiana Cases

Cleveland Construction, Inc. v. Levco Construction, Inc., 2012 Tex. App. LEXIS 592 (Tex. App.—Houston [1st Dist.]

Is a one-sided arbitration clause valid?

court for nonpayment and wrongful termination. The subcontractor also sought a declaratory judgment that an arbitration clause in its subcontract was invalid as "illusory" – because the arbitration clause called for arbitration at the election of the general contractor only. The subcontractor also argued that the arbitration agreement, in any event, did not contain a "survival clause" that would allow it to survive after termination of the contract by the general contractor. For its part, the general contractor initiated arbitration with the American Arbitration Association, alleging the subcontractor's breach of the subcontract.

The arbitration clause read, in pertinent part:

> Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio.
>
> [Emphasis added.]

Noting that arbitration agreements "must be supported by consideration, or mutuality of obligation, to be enforceable," the court found that the remainder of the underlying contract provided sufficient "consideration" for the parties's agreement to the particular type of unilateral arbitration clause.

Regarding the lack of a "savings clause," the court held that, by law, an arbitration agreement in a contract "survives the termination or repudiation of the contract as a whole" (treating the agreement to arbitrate as severable or separate from the remainder of the contract). (We note for our readers, however, that care should be given when contracts are sought to be declared "terminated" or rescinded based upon another party's breach, as the effect of such may be the mutual release of all further obligations between the parties – a result which may not be intended by the non-breaching party.)

In re Manuel J. Moroun v. Detroit International Bridge Company, 2012 Mich. App. LEXIS 214

In many jurisdictions, contractors are sensitive to laws which impose severe – and even sometimes criminal – sanctions for failure to make timely payments to subcontractors and suppliers. In this case, however, the director and president of a general contractor were sent to jail principally because their company did not properly prosecute the work for which it contracted, albeit after a court ordered the company to do so.

The director and president of the general contractor were ordered to be imprisoned in the Wayne County Jail until their company "fully" complied with a roughly two-year-old court order entered against the contractor and its performance bond surety in a lawsuit involving the Michigan Department of Transportation as plaintiff. On appeal, the individuals sought to be released from prison but were denied (although the appellate court required the lower court to revise its order concerning "full" compliance, as full compliance was not within the immediate ability of the contractor to accomplish; maintaining the requirement would effectively prevent the appellants from being able to "purge the contempt").

However, roughly 5 months later, MDOTreactivated contempt proceedings against the general contractor, citing

the contractor'scontinuing violation of the court's original judgment. Nearly 6 months later the trialcourt issued its ruling finding the contractor to indeed be in violation of the original court judgment, and indicated that the court was seriously considering several meansto "coerce compliance" with the original judgment, including, "financial sanctions and/or imprisonment. . .." In connectiontherewith, the court ordered the contractor's director and president to appear before the court two months hence on the sanctions issue. At that later hearing, the general contractor was fined the maximum amount possible and the director and president were taken into custody and jailed. The director and president appealed and sought release on the basis of lack of notice/due process and abuse of the civil contempt power of the court, but relief on those bases was denied bythe Court of Appeals.

New National Labor Relations Board posting requirement delayed a second time

The National Labor Relations Board published a new rule on August 26, 2011,requiring most private-sector employers to post a new notice issued by the NLRB ("Employee Rights under the National Labor Relations Act"). Excluded from the rule are agricultural, railroad, airline and United States Postal Service employers.

The rule was initially to take effect onNovember 14, 2011, although the effective date has been moved twice (first to January31, 2012, and now to April 30, 2012).

For additional information on the NLRB requirement, please contact Norman Mott of the firm.

ANNOUNCEMENTS

Shields Mott Lund welcomes to the firm Shailendra U. "Shay"Kulkarni as an associate attorney. Shay is a fourth-year attorney andcomes to us from another New Orleans-area law firm.

The firm congratulates partners Lloyd N. "Sonny" Shields, Daniel Lund, III and Elizabeth L. "Betsy" Gordon for being named Louisiana Super Lawyers for 2012. Sonny and Dan were listed in the ConstructionLitigation category, and Betsy in the Construction/Surety group.

Construction Seminars

Shields Mott Lund is pleased to announce the following construction law seminars:

Zoning and Land-Use Law
(Lorman Education Services)
New Orleans, Louisiana
May 8, 2012, 8:30 a.m. 4:30 p.m.

AIA Contracts
(Lorman Education Services)

Baton Rouge, Louisiana
August 10, 2012, 8:30 a.m. – 4:30 p.m.

Our seminars are designed to address the legal issues that the construction industry faces and to zero in on the options that make the best legal advice. Understanding these issues and choices and being prepared for potential problems are the best ways to avoid pitfalls. Additional information on the listed seminars can be obtained by contacting Dan Lund at Shields Mott Lund (504-581-4445), or from Lorman at www.lorman.com.

The partners are pleased to have authored and to announce the release of the Louisiana Construction Law Book, a complete and current reference tool for contractors, surety companies, insurers, owners and design professionals in construction industry disputes - or if seeking to avoid disputes while working in Louisiana.

Published by HLK Global Communications of Vienna, Virginia, the easy-to-use 286-page comprehensive manual will help guide you through the Louisiana statutes and case law governing public works and private construction projects of any size. Topics covered in the book include contract drafting and interpretation, lien claims and enforcement of or defense against those, ordinary claims and disputes on the job (including changes in the work,

delay and acceleration claims and claim documentation and preparation), differing site conditions, available damages and remedies, public works bidding and bid disputes, surety bonds, different types of insurance, licensing, statutes of limitation, collection strategies, alternative dispute resolution methods and others. For more information, please go to http://www.constructionchannel.net/law_books/Louisiana.asp.