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CONSTRUCTION LAW ALERT

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Subcontractor Claim Reinstated

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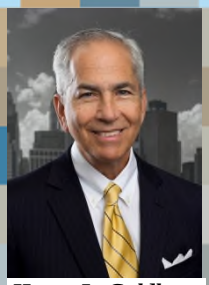
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In a previous MHH Alert (September 2018) we highlighted a rare event: a recent New York appellate decision in which the court reinstated a subcontractor's claim, notwithstanding its failure to satisfy a condition precedent to the claim being filed. In that case, the contractor did, in fact, neglect to verify the claim as required. The appellate court held that to dismiss the claim for a technical failure (the contractor had submitted notice and documentation of its claimed damages, just not with the required verification, *i.e.*, a COFED) would be a "disproportionate forfeiture" under circumstances where the noncompliance was *de minimis* and the defendant-public owner had shown no prejudice.

Continuing Development

In a continuation of this refreshingly fair and reasonable handling of construction claims, another New York appellate court recently reinstated a subcontractor's lawsuit which had been dismissed by a lower court as being untimely.

Under New York law, the time within which a lawsuit based upon a contract dispute must be commenced is six years. However, it is well-settled law, and common practice in the construction industry, for the parties, by agreement, to establish a shorter period.

In this second case, also involving a NYC School Construction Authority project, the subcontractor sued the general contractor seeking recovery of monies the subcontractor claimed were due following substantial completion of its work. The subcontract specified that the final amount to be paid was subject to any credit changes as determined by the SCA, and made payment by the SCA to the general contractor a "condition precedent" to general contractor's obligation to pay subcontractor (which, in New York, may or may not be enforceable depending on the particular circumstances - but that is a discussion for another article).

The subcontractor completed its work in June 2012 and submitted its invoice specifying the charges for asbestos and PCB containing material and a proposed credit for materials which were not hazmat. The subcontractor commenced its lawsuit nearly four years later in March 2016.

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The general contractor moved to dismiss subcontractor's lawsuit based on the contractual limitation provision which specified that any lawsuit needed to be commenced within one year from substantial completion. In opposing the general contractor's motion to dismiss, the subcontractor submitted evidence that the general contractor itself did not convey to subcontractor the amount agreed to by the SCA with respect to the non-hazmat credit change order until March 2014, and that the final change order was not signed by the SCA until June 2016 (or after commencement of the lawsuit). Nevertheless, the trial court agreed with the general contractor, granted its motion and dismissed the subcontractor's claim as untimely.

The appellate court, however, took a surprisingly fair approach. It reinstated the subcontractor's lawsuit finding that the one year contractual limitation provision was "neither fair nor reasonable," particularly under the circumstances.

The appellate court, in reversing the lower court's decision, stated that while a contractual provision which shortens the general New York State six-year Statute of Limitation in contract cases was enforceable, "the period of time within which an action must be brought…should be fair and reasonable in view of the circumstances of each particular case [and that] [t]he circumstance, not the time, must be the determining factor." Examining the circumstances of subcontractor's lawsuit, the appellate court went on to state "[t]here is nothing inherently unreasonable about the one-year period of limitations to which the parties here freely agreed…'[t]he problem with the limitation period in this case is not its duration, but its accrual date'."

Focusing on the application of the contractual limitation provision and the fact that the SCA did not determine the amount of the credit (deduct) change order, nor sign it, until well after the expiration of the one-year from substantial completion contractual limitation provision, the Appellate Court held:

> "A 'limitation period that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim'. The limitation period in the subcontract conflicts with the conditions precedent to payment becoming due to the [Subcontractor], which, under the circumstances of this case, acted to nullify any claim the [Subcontractor] might have for breach of the subcontract. Therefore, interpreting the subcontract against the [Contractor], which drafted the agreement, we find that the one-year limitation period is unenforceable under the circumstances here."

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MH&H Commentary

In what we hope to be a growing trend amongst New York appellate courts (namely, taking a fair and reasonable approach in applying contract terms in construction disputes), the appellate court observed that to narrowly interpret and apply the reduced contractual limitation period would have the effect of "nullifying" the claim before the subcontractor could have even realized it had, let alone properly asserted, its potential claim. Clearly, the potential good a case such as this could engender is significant.

If your company finds itself confronted with a COFED-type argument that your claim or lawsuit is untimely, we recommend you review the facts and circumstances of your project with experienced counsel to see if mitigating arguments, based on your unique circumstances, can be creatively used to avoid a forfeiture. This can mean the difference between a profitable job and a disaster.

Any issues raised in this Alert may be addressed to either Mr. Goldberg or Mr. Fryman who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com or rfryman@moritthock.com

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