CONSTRUCTION LAW NEWSLETTER

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TRENDS IN CONSTRUCTION LAW

New York State statutes provide a structure for retainage procedures on construction projects. For example, State Finance Law section 139-f limits retainage to 5% on public projects (or 10% if a payment bond is requested and not provided). In addition, the Prompt Payment Law (GBL section 756-c) provides that a reasonable amount of retainage may be withheld on private projects to which the law applies, but the amount of retainage withheld from subcontractors and suppliers may not exceed the amount withheld by the owner. Furthermore, Lien Law section 10 was amended in 2011 to provide that a lien for retainage may be filed on a private project "within ninety days after the date the retainage was due to be released." This amendment closed a loophole which caused lien rights for retainage to expire prior to retainage becoming due. However, this amendment does not apply to public projects.

On public projects, liens for all amounts due must be filed within 30 days of completion and acceptance of the entire project. This timeframe is problematic for subcontractors or suppliers who do not directly contract with the prime contractor because they are required to notify the prime contractor of their intention to file a bond claim within 120 days of the last labor or material furnished on the project (State Finance Law 137(3)). Thus, on a public project, bond rights could easily expire while a subcontractor or supplier is waiting for its retainage. In such instances, lien rights may still be available, but project funds may be depleted at that point and therefore, there would be no lien fund to which the public improvement lien would attach.

CASE LAW UPDATE

On December 23, 2015, The Second Department Appellate Division decided the case of *Thompson Bros. Pile Corp. v. Rosenblum.*

The case involved a dispute between a general contractor and an owner. After the owner refused to pay the contractor, the contractor and seven subcontractors filed mechanic's liens on the property. The contractor subsequently filed an action to foreclose its mechanic's lien and the required notice of pendency, which extended the mechanic's liens for a period of three years from the date of the filing of the notice of pendency (Lien Law section 17).

When more than three years passed after filing the notice of pendency (and while the litigation was pending), the owner filed a motion to discharge all of the mechanic's liens and dismiss the lien foreclosure cause of action. In response, the contractors sought to extend the notice of pendency and in turn, their mechanic's liens. The Appellate Division held that the mechanic's liens expired after three years at the same time the notice of pendency expired. It further held that the contractors could not extend the mechanic's liens after they had already expired. The owners motion to discharge the liens and dismiss the lien foreclosure cause of action was granted.

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