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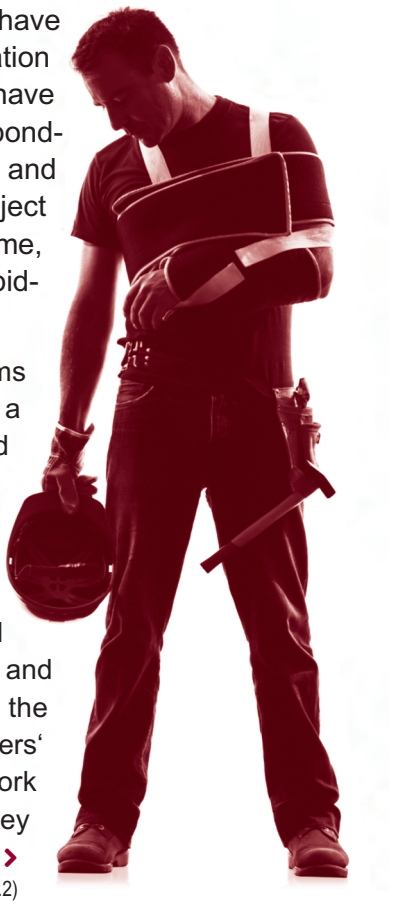
FOR THE DESIGN PROFESSIONAL

The Design Professional's Duty to the Injured Construction Worker Under the New York State Labor Law

BY DOUGLAS L. PINTAURO, ESQ. AND MARTIN A. SCHWARTZBERG, ESQ.

With the Great Recession now in the rear view mirror, the construction industry appears to be on the slow road to recovery. Whether this slow revival is due to the developers' belief that the recession in the mirror is closer than it appears, or because the recession is just not receding quickly enough, does not matter as long as construction continues on the path to recovery. With the resumption of construction, however, comes the inevitable claims. While the development and gradual acceptance of Integrated Project Delivery (IPD), Public-Private Partnership (PPP), Design/Build and Building Information Modeling (BIM) may have minimized the risk of certain claims due to the collaborative effort in developing, designing and constructing projects, they have not eliminated claims. In fact, by emphasizing collaboration and sharing resources and information, these practices have done more to blur the lines of responsibility (and correspondingly, liability) for the development, design, construction and management of a project to the point where some project participants are now exposed to risks that were, at one time, completely foreign to them under the traditional design-bid-build project delivery system.



Among the more persistent construction related claims which will likely be unaffected by whether the project is a PPP, Design/Build, or IPD, are those asserted by the injured construction worker. In this regard, most architects and engineers find it incredible that injured laborers could assert viable claims against the party that designed the project. The fact is, however, that they can and do. One of the more problematic claims of this nature are those based upon violations of the New York Labor Law §§ 200, 240(1) and 241(6). Significantly, while these particular sections of the Labor Law were essentially promulgated to codify the owners' and contractors' duty and obligation to provide a safe work place and appropriate site safety practices for laborers, they have been extended to apply to construction managers, ›

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The Design Professional's Duty to the Injured Construction Worker... (continued from p.1)

architects and engineers under certain circumstances. Of course, to most architects and engineers, the distinction between a claim based upon a breach of contract, negligence, or a Labor Law violation, is of no significance. For most, the fact that you are embroiled in a lawsuit is all that matters. However, a Labor Law claim is somewhat unique.

In general, Labor Law §200, is essentially a codification of an employer's common law duty to provide its employees with a safe place to work. However, the statute also extends this duty to the owner of the work site, as well as the general contractor. While an architect or engineer whose services are limited to design is not subject to liability under Labor Law §200, if the architect or engineer supervised or controlled the activity which caused or contributed to the laborer's injury, then Labor Law §200 will apply to the architect or engineer. In this regard, Labor Law §200 would apply to an architect or engineer in cases where a municipal contract authorizes the engineer to stop the work if the contractor fails to correct site conditions that are unsafe for the laborers. Labor Law §200 has even been applied to engineers in situations where the engineer advised the contractor of the need to maintain a clean work site and a laborer was subsequently injured when he tripped over debris.

Among the defenses available to a Labor Law §200 claim is the injured laborer's comparative negligence, which would reduce any monetary recovery awarded to the laborer in proportion to the degree of the laborer's culpable conduct.

Unlike §200, Labor Law §240(1) is limited to elevation related risks (e.g., workers falling from a ladder, elevated objects falling onto a laborer, etc.). In essence, it imposes a nondelegable duty upon all owners, contractors and their agents that are engaged in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure to furnish or erect scaffolding, hoists, stays, ladders, slings, hangers, pulleys, ropes and other devices in order to provide proper protection to the laborers performing such work. Accordingly, §240(1) is violated when no safety device is provided or when a safety device fails to provide proper protection to the laborer. In this regard, while a laborer must prove that the failure to provide proper protection was a "substantial factor" in causing the elevation related injury, the laborer need not prove that it was the only cause of the injury.

For most, the fact that you are embroiled in a lawsuit is all that matters. However, a Labor Law claim is somewhat unique.

Significantly, §240(1) specifically states that architects or engineers that "do not direct or control the work" for activities other than planning and design will not be liable for failing to provide protection to a laborer. Accordingly, if an architect's or engineer's services are limited to design, then there would be no exposure under Labor Law §240(1). The same is also true in cases where the architect or engineer merely inspects the work to determine if it is in general conformance with the plans and specifications. However, if the architect or engineer is authorized (or assumes the authority) to direct, control, or supervise the work, then the architect or engineer will be subject to Labor Law §240(1). Significantly, Labor Law §240(1) is sometimes ›

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FOR THE DESIGN PROFESSIONAL

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Pitfalls in Architect of Record/Design Architect Projects

BY LEE J. SACKET, ESQ.

Whether due to the increasing complexity of New York City construction projects, or because a developer simply wants to promote a brand-name architect, or "starchitect", with the project, the engagement of multiple architects on a single project is not uncommon. A typical scenario involves a Design Architect ("DA") developing the design concepts and early design documents, followed by the Architect of Record's ("AOR") preparation of the construction documents (based on the DA's design drawings) and providing construction administration services. The involvement of multiple architects on a single project, however, can result in duplication of effort, overlapping responsibilities, unnecessary delays and, when a problem or lawsuit arises, finger pointing. This article identifies some of the common issues which should be considered if and when you are involved in this type of project.

At the forefront, the AOR is typically retained to prepare construction documents reflecting the DA's design. To accomplish that task, the AOR may adopt or incorporate some or all of the DA's design onto the AOR's stamped drawings. The AOR's certification of the DA's design, however, can be considered unprofessional conduct under Regents Rules §29.3(a)(3). In essence, Regents Rules §29.3(a)(3) states that it is unprofessional conduct for a design professional to certify by affixing the licensee's signature and seal to documents for which the processional services have not been performed by the licensee. Section 29.3(a)(3), however, allows the AOR to certify the DA's design/drawings if it: 1) performs a thorough review of the drawings; and 2) prepares and retains a written evaluation of the drawings. A list of items which should be, at a minimum, addressed in the evaluation in order to comply with §29.3(a)(3) is published by the NYS Education Department and can be found on its website. (www.op.nysed.gov). Depending on the results of this evaluation, the AOR may either correct, alter, or add to the existing documents, or prepare additional documents to address any deficiencies or omissions. It is only when the documents satisfy the appropriate standards that they may be signed and sealed by the AOR. Importantly, once the AOR certifies the construction documents, the AOR is responsible for the design, regardless of whether the concept or drawings were originated by and/or through the DA. Notably, §29.3 (a)(4) states that it is also unprofessional conduct if a licensee fails to maintain the evaluation (among other things) for at least six years.

> The delineation of responsibilities between the Design Architect and Architect of Record is not always clear.

Who was responsible for that? Undoubtedly, either during the project or after construction is completed, an issue may arise prompting this question to be asked and analyzed. The delineation of responsibilities between the DA and AOR, however, is not always clear. The first complication is the likely existence of separate contracts between the architects and the ›

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New Jersey Restrictions on Pre-Existing, Nonconforming Use

BY MARIE ANN HOENINGS, ESQ.

The Appellate Division in New Jersey recently determined that because an owner of a residence removed every part of the structure, except the foundation and footings, he had totally destroyed the property such that its existing nonconforming use and

A stop work order was ultimately issued when the code enforcement officer found that too much of the building had been removed so that it was now considered “new construction”.

right to continue that use, ceased. More importantly, the Court determined that regardless of whether the destruction of the structure was by design or by accident, the rights would be terminated.

The property in issue was erected long before the applicable zoning restrictions were promulgated. As a result, the property was nonconforming in multiple ways. The owner filed an application for the “repair” and “renovation” of the existing building. On the approval form, the borough’s zoning office indicated that there was to be no expansion of the structure’s dimensions. The approval was for siding, shingles and additional windows only—no bump outs. The project architect characterized the project as a “rehab of the entire building” and “total renovation.” During construction, it was determined that the building was in much worse condition than had originally been anticipated. Based on this discovery, the building inspector determined that the entire structure needed to be demolished. The building was not habitable before construction and evidently had not been habitable for years. The owner demolished the building without providing prior notification to the borough’s zoning officer who had approved the original permit.

A stop work order was ultimately issued when the code enforcement officer found that too much of the building had been removed so that it was now considered “new construction”. The zoning officer also determined that the work went well beyond the parameters of the permit. On review, the Zoning Board considered the borough zoning ordinance that states: “a pre-existing nonconforming use may be repaired or maintained, so long as the repair or maintenance does not result in total destruction.” The issue in dispute was whether the demolition constituted a total or partial destruction.

The lower court ruled in favor of the owner and the municipality appealed. The issue for the Appellate Court was whether the owner had dismantled the structure beyond partial destruction. The Appellate Court found that the owner had. At the time the stop work order was issued, only the original foundation and footings remained and new wall frames had been erected. The Court indicated that it must “consider ›

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Working Without a Contract

BY DOUGLAS L. PINTAURO, ESQ.

Contrary to the belief of many, risk management does not begin with construction. It begins with negotiating the contract. In this regard, one of the most critical elements to risk management is that the project architect or engineer, as well as the owner, know what their respective obligations are before work on the project begins. To these ends, the contract should include a detailed scope of services that identifies not only the architect's or engineer's obligations, but what they are not. By way of example, the contract should identify the scope of shop drawing review, the scope of the architect's or engineer's site visit responsibilities, and whether or not the architect or engineer will undertake any site safety obligations.

Of course, there are many situations in which the project's time constraints, the owner's financial commitments, or any one of a number of other reasons, make it impractical to negotiate a comprehensive contract, or any contract, before the architect or engineer must start to provide design services. Rather than risk losing the job, therefore, the architect or engineer may decide to proceed with the work with either a bare bones contract, or simply without any signed contract. While this is certainly not the recommended way to proceed, it is a reality of the practice. In the event this situation arises, however, there are still some risk management precautionary measures that the architect or engineer can employ in order to minimize disputes as the project progresses. The following are some examples of common situations and how they might be addressed.

Should you undertake a project without a contract, proceed defensively and carefully.

SCENARIO 1

Contract negotiations have progressed to the point where only two or three provisions have not been agreed upon. Notwithstanding the ongoing negotiations, the owner insists that the architect or engineer proceed with the work. In this scenario, the architect or engineer might consider issuing a letter: (1) identifying the specific contract provisions that are still being negotiated and confirming that the remaining provisions have been accepted by both the architect or engineer and the owner; (2) advising the owner that you will proceed with the work without a signed contract, as an accommodation to, or in recognition of, the owner's financial commitments and/or time constraints. In doing so, however, advise that you will comply with the contract provisions that have been accepted and expect that the owner will do so as well; and (3) noting that you will continue to negotiate with the owner over the few contract provisions that are still in issue until both parties can agree upon and execute the contract.

SCENARIO 2

The general services have been agreed upon (e.g., architectural design services, shop drawing review, periodic site visits, certifying payments to the contractor, etc.), but the specific scope of these services were neither addressed nor identified in the letter agreement. Under these circumstances, consideration should be given to defining the extent of the services during the course of the project. For example, after conducting shop drawing review, the architect's or engineer's shop drawing stamp should clearly indicate the extent of the architect's or engineer's review. Such language might state as follows: "Engineer's review is for general conformance with the design concept. The Engineer's review neither relieves the contractor from compliance with the Contract Documents nor authorizes departures therefrom unless specifically indicated by the Engineer on the shop drawing."

SCENARIO 3

The scope of services is only generally described in the agreement. In such circumstances, disputes ›

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Pitfalls in Architect of Record/Design Architect Projects (continued from p.2)

owner. Depending upon when each contract was entered and who negotiated the contracts, they may not be coordinated. As a result, they may have competing and contradictory clauses. In fact, the contracts may not even recognize the involvement of the other architect, which can potentially result in unintended and duplicative work and responsibilities. Accordingly, the importance of clarity in the contract is critical. For example, from the DA's perspective, if its services are limited to design development, it would be prudent to specify an end date for the DA's services, as well as what role, if any, the DA will have during the construction phase.

Depending upon when each contract was entered and who negotiated the contracts, they may not be coordinated. As a result, they may have competing and contradictory clauses.

The use of electronic communication during the project, most commonly accomplished through e-mail, has also blurred the boundaries of responsibility. Due to the ease and brevity of e-mail, it is commonplace for the architects to collaborate throughout a project, regardless of the issue. These communications, however, can create the impression that an architect is involved with an issue which he or she is not contractually obligated to address. It is important that the design professional recognize the potential ramifications of sending an e-mail opining on an issue which the architect is not contractually obligated to address, or at a minimum, document the reason why the architect is participating in such an exchange. In hindsight that e-mail could suggest that the architect assumed responsibility for an issue which may have been within the scope of the other architect's services.

Projects involving multiple architects are generally beneficial to the architectural and engineering market in that they create additional opportunities for involvement with a given project. However, when considering a position as a DA or AOR, you should carefully consider and understand the risks associated with that role and prepare accordingly. ■

SEMINAR BULLETIN

● LBC&C partner, Martin A. Schwartzberg, recently presented a webinar for the American Council of Engineering Companies of New York (ACEC) entitled "Ethics and Board of Regents Requirements" which educated engineers on Board of Regents requirements and regulations concerning the naming of professional corporations, restrictions on advertising for design professionals, how to prevent claims of fee splitting and rubber stamping and the proper maintenance of project files.

● LBC&C partner, Douglas R. Halstrom and LBC&C associate, Gary Strong, recently presented a seminar to the ACEC New Jersey members entitled "Key Contractual Provisions for Engineers", together with Josh Lluch of Singer Nelson Charlmers. This seminar addressed important strategies in contract drafting and negotiating specific to the engineering profession and the services it offers.

● Doug and Gary also presented a seminar at the 24th Annual AIA Trade Show sponsored by AIA Newark & Suburban and The Architects League of Northern New Jersey. The program focused on how architects can manage their risks and limit their liability through their contracts.

Information regarding these and other seminars may be obtained by contacting Margie Morabito at 516-294-8844 or mmorabito@lbcclaw.com.

ABOUT THE FIRM

LBC&C, founded in 1981, has offices in Garden City, New York and East Hanover, New Jersey. From these two locations, the Firm provides a wide array of legal services to design professionals throughout the New York Metropolitan area, Long Island, upstate New York and central and northern New Jersey. In addition to representing design professionals, the Firm has a recognized practice in other areas of professional liability, as well as environmental, employment practices liability, product liability, trust and estates and insurance law. As a full service law firm, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices. Always on the alert for new trends in business and changes in the law, LBC&C is continuously striving to keep its clients ahead of their competitors. Working in conjunction with each other, the Practice Groups at LBC&C provide a network of legal experience that can meet today's design professional's needs. For additional information visit our website at **www.lbcclaw.com**

New Jersey Restrictions on Pre-Existing, Nonconforming Use (continued from p.4)

whether the destruction is so substantial in nature—qualitatively, if not quantitatively—to surpass the 'partial' threshold that the statute expresses." In doing so, the Court determined that removal of the walls down to the foundation and footings effectively constituted a total destruction of the property.

> The issue for the Appellate Court was whether the owner had dismantled the structure beyond partial destruction.

The Appellate Court did note that the lower court's concerns about hardship to innocent property owners was misplaced. Specifically, the Court noted that the owner permitted the deterioration of the property and did nothing to maintain the structure prior to undertaking the work in issue. In addition, the Appellate Court seemed to be significantly persuaded by the fact that the owner had violated the parameters of the building permit. The original approval was for siding, shingles and additional windows, not for the total destruction and rehabilitation of the building. As a result, the Court rejected the owner's argument of hardship, good faith reliance or equitable estoppel. ■

Working Without a Contract (continued from p.5)

usually arise over what is included in basic services and what constitutes additional services. In the interest of addressing this issue before providing what the architect or engineer may consider to be "additional services", the architect or engineer should correspond with the owner and request written authority to provide the additional services in issue. If the owner believes these services are, or should be, part of the poorly defined basic services, the issue can be addressed at this point in time and before the services are rendered. If the services are provided without written authorization, or before an understanding is negotiated, the architect or engineer could very well be surrendering whatever leverage he or she may have otherwise had in negotiating this issue.

It is never advisable to proceed with a project without a signed contract, or with a poorly drafted contract. Sometimes, however, the value of a contract is secondary to the value of being hired for the job. Should you undertake a project without a contract, proceed defensively and carefully. The practical tips noted above are not a substitute for a contract. Rather, they are simply suggestions of what may be done to minimize the very real risks presented by proceeding without a contract. ■

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The Design Professional's Duty to the Injured Construction Worker... (continued from p.2)

applied liberally, as in circumstances where the engineer reminds the contractor of the need to shore and brace an excavation before the excavated area collapses onto a laborer. This, of course, is significant in that liability under §240(1) is contingent upon a finding that the statute was violated and that the violation was a contributing cause to the laborer's accident. Unlike a negligence claim, once those elements are established, the laborer's contributory negligence is not a defense. Rather, the laborer's misconduct is only a defense if the laborer's actions are the sole proximate cause of his or her injuries. Similarly, if the laborer's misconduct is sufficiently egregious, a defendant may avail itself of the "recalcitrant worker" defense. In order to do so, the defendant must not only establish that the laborer was provided with adequate and safe equipment, but that the laborer deliberately refused to use it. This defense is typically difficult to establish since the mere availability of the proper and safe equipment is not sufficient. The laborer must deliberately refuse to use the equipment.

Unlike §240(1), Labor Law §241(6) provides that all owners, contractors and their agents, when constructing or demolishing buildings or doing any excavating in connection with the construction or demolition work, must perform such work so that all affected areas are constructed, shored, equipped, guarded, arranged, operated and conducted to provide reasonable and adequate protection and safety to the persons employed therein, or lawfully frequenting such places. As with §240(1), Labor Law §241(6) imposes a non-delegable duty upon all owners, contractors and their agents. Accordingly, the duty to provide reasonable and adequate protection and safety cannot be assigned to another.

In order to assert a viable §241(6) claim, the injured laborer must prove that the owner or contractor violated the Industrial Code. This burden, however, is not satisfied by merely referencing the Industrial Code's general safety standards, or claiming a violation of OSHA regulations. Even if this element is established, the injured laborer's comparative negligence is a defense to a §241(6) claim.

While §241(6) does not specifically refer to architects or engineers, they can nevertheless be found liable under this section if it is determined that the architect or engineer directed, controlled or supervised the work in issue. This would include, for example, instances where the architect or engineer supervised the method and manner of the work.

Labor Law §§ 200, 240(1) and 241(6) were crafted to hold the owners and contractors accountable for site safety inasmuch as they are the parties that typically control the site. Notwithstanding the apparent focus of the statute, however, the more site responsibilities the architect or engineer assumes, the greater the risk that the architect or engineer will fall within the Labor Law liability net. Supervising the work, ensuring compliance with site safety, empowered with the authority to stop the work, determining or approving the means, methods and procedures of the contractor, are all obligations that provide the architect or engineer with greater control, and with it, greater responsibility and liability. ■

ABOUT OUR NEWSLETTER

Legal Counsel for the Design Professional addresses current legal developments affecting architects and engineers. The articles contained in this publication are for your information. You are advised to consult with legal counsel to address whatever specific issues you may have. Your questions, comments and suggestions are appreciated and should be directed to the Practice Group's chairperson, Douglas L. Pintauro, Esq., at L'Abbate, Balkan, Colavita & Contini, L.L.P., 1001 Franklin Avenue, Garden City, New York 11530 516.294.8844 **dpintauro@lbcclaw.com**

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