



SCHWARTZ SEMERDJIAN

Attorneys at Law

Schwartz Semerdjian Cauley & Moot LLP
101 West Broadway, Suite 810 • San Diego, CA 92101-8229 • *tel:* 619.236.8821 *fax:* 619.236.8827
www.sscmlegal.com

NEW CASES CHANGING THE WAY YOU DO BUSINESS

If you have any further questions regarding construction related issues, please do not hesitate to contact Kevin T. Cauley, Esq. at (619) 236-8821 or by email at kevin@sscmlegal.com.

Labor

Augustus v. ABM Security Services, Inc.

The California Supreme Court held in *Augustus v. ABM Security Services, Inc.* that California law prohibits on-duty and on-call rest periods and requires instead that employers relinquish any control over how employees spend their break time. The ABM case was brought by a class of security guards who were required to keep their pagers and radio phones on during rest periods, to remain vigilant, and to be available to respond to calls when the need arose. Under these circumstances, the Court concluded that ABM did not permit its employees to take off-duty rest periods because it did not relieve the employees of all duties and relinquish control over how the employees spend their break time.

Remedies

Hub Construction Specialties Inc. v. Esperanza Charities Inc.

Hub Construction supplied materials to the general contractor working on a construction project on property owned by Esperanza Charities. After the contractor failed to pay Hub Construction, Hub Construction sent preliminary 20-day notices of mechanic's lien to Esperanza and others by certified mail. It did not have a return receipt of certified mail but Esperanza stipulated that it had received the notice. Hub Construction later filed a complaint to foreclose the lien. The court denied its motion for summary judgment and ordered the property released from the mechanic's lien because Hub Construction had not strictly complied with the notice statute then in effect.

The appeal court reversed the decision stating that while strict compliance with notice provisions of the mechanic's lien law is required, applying that rule to a statutory provision governing proof that the required notice was properly given was not required. Esperanza's stipulation that notice was served in the statutorily prescribed manner eliminated the need for proof.

Picerne Construction Corp. v. Castellino Villas

Picerne Construction Corp. entered into an agreement with Castellino Villas to build an apartment complex for Castellino. Following construction, Picerne recorded a claim for a mechanic's lien and subsequently filed a complaint to foreclose the lien. The court held that failure to timely record a claim of lien precludes its enforcement.

Civil Code section specified that an original contractor like Picerne must record his claim of lien after he completes his contract and before the expiration of 90 days after the completion of the work of improvement. An owner's acceptance of the project is equivalent to completion of the work of improvement under section 3115. The legislature defined completion of the work of improvement as actual completion and not substantial completion as Castellino contended. Because Picerne recorded the lien within 90 days of when Castellino accepted the project and when Picerne's subcontractors performed the work, the court did not err in concluding that the lien was timely recorded.

Contracts

Construction Industry Force Account Council Inc. v. Ross Valley Sanitary District

Ross Valley which operated and maintained sewer lines and pumping stations in Marin County had historically performed "spot repairs" on problematic sections of the sewer lines. In 2010, Ross Valley began using a new effective "pipebursting" technique that allowed it to replace 350 sections of pipe effectively without engaging in work-intensive spot repairs. In 2011, its Board authorized hiring new employees capable of performing pipebusting work to repair a 139-mile sewer line. The Construction Industry Force Account Council, a trade association consisting of California unions, contractors' associations, and contractors, opposed the proposal arguing it violated Public Contract Code section 20803.

The Court of Appeal stated section 20803 which applies to the District required the District to put any District project costing over \$15,000 out for competitive bid and contract as provision by Public Contract Code section 20805. However, this provision requiring a competitive bidding process only applies to contracts by sanitary districts. Where, as here, the District chose to use its own employees to complete the project regardless of cost, it need not comply with the competitive bidding process.

Flintco Pacific Inc. v. TEC Management Consultants Inc.

In May 2011, TEC submitted to Flintco a bid to perform subcontract work on a project. TEC's bid contained, among other things, a deposit term and other conditions that affected the bid. Being the lower, Flintco, in turn, submitted its written general contractor's bid using TEC's figures. In July, Flintco sent TEC a standard form subcontract that conflicted with TEC's May bid proposal. Flintco sent a new but unmodified subcontract that did not acknowledge any conditions contained in TEC's bid. On September 12, TEC withdrew its bid. Flintco subsequently sued TEC alleging promissory estoppel. The trial court ruled in favor of TEC.

The Court of Appeal upheld the result saying the general contractor may recover damages incurred as a result of its reasonable reliance on a subcontractor's mistaken bid under the theory of promissory estoppel. However, Flintco ignoring TEC's deposit requirement and other material terms was not reasonable.

Watson Bowman Acme Corp. v. RGW Construction Inc.

RGW, the successful low bidder on a Caltrans project, contracted with Watson Bowman for the delivery of certain joints for use on the project. Caltrans initially rejected Watson's joint choice, but subsequently approved its use of larger joints. RGW and Watson disagreed as to the compensation owed to Watson. Watson sued RGW and the jury ultimately found in Watson's favor and awarded damages. Watson was denied prejudgment interest by the trial court.

The Court of Appeal ruled Watson's entitlement to prejudgment interest depends on whether the compensation owed to Watson for delivering the larger joints was certain or capable of being certain by calculation and it was. Thus, the trial court erred in failing to award Watson prejudgment interest.

Pulte Homes Corp. v. Williams Mechanical Inc.

Pulte sued Williams Mechanical alleging it negligently performed on a subcontract for installation of plumbing in two residential construction projects. Even before the action was filed, Williams was defunct. Initially it was suspended by the Secretary of State and later it dissolved voluntarily. The attorney who Williams had designated as its agent for service of process did not notify Williams or its liability insurer. Pulte obtained a default judgment against Williams. After First Specialty Insurance learned of the action, it retained counsel for Williams and Williams' counsel filed a motion to set aside the default. The trial court granted the motion.

The Court of Appeal reversed the decision of the trial court and said Williams filed its motion less than six months after entry of default judgment but more than six months after entry of default. Therefore, under Code of Civil Procedure section 473, it did not have jurisdiction to act.

Blois Construction Inc. v. FCI/Fluor/Parsons

The Exposition Metro Line Construction Authority contracted with FCI for a rail project. Blois Construction served as a subcontractor. When the project was half completed, Expo began making full progress payments to FCI without withholding any retention. Nevertheless, they continued to withhold past retentions from FCI which then withheld past retentions from Blois. Expo did not release the previously withheld funds until 2014 or later. Following completion of its work, Blois sued to recover the withheld retentions. FCI ultimately paid what was owed but with respect to penalties under Public Contract Code section 7107, the trial court ruled against Blois.

The Court of Appeal upheld that ruling. Pursuant to Public Contract Code section 7107, when a project owner pays a direct contractor the amount it had previously withheld as retentions, the direct contractor must pay its subcontractor their share of retention within seven days or face penalties. Because the retention was withheld by the owner, FCI's obligation under 7107 was not triggered until it was paid.

Morlin Asset Management LP v. Murachanian

Plaintiff was an employee of Arax Carpet. Murachanian, the tenant, engaged plaintiff's employer to clean the carpets in his dental office. Arax sent plaintiff and another man to do the work. As he walked up a flight of stairs, plaintiff slipped, falling forward and suffered severe injuries. Plaintiff sued the landlord, Morlin Asset Management, claiming the stairs presented a dangerous condition.

The Court of Appeal held that indemnity clause in the case barred the cross-complaint. The tenant agreed to indemnify the landlord for claims arising out of, involving or in connection with his use or occupancy of the dental suite. The court felt that the hiring of Arax to clean the carpet does not mean the standard indemnity clause applies.

Torts

Khosh v. Staples Construction Co. Inc.

California State University Channel Islands hired Staples Construction to install a backup electrical system at the university. Staples then hired DK Electrical Systems Inc. as the high-voltage subcontractor at the project. DK, in turn, hired Myers Power to construct and install electrical switchgear for the system. Al Khosh, who worked for Myers, was injured while performing the electrical work.

Staples successfully moved for summary judgment under the *Privette v. Superior Court* doctrine which generally prohibits the employee of a contractor from suing the hirer of the contractor for work-related injuries, which generally leaves the injured worker with workers' compensation remedies. Khosh failed to show that Staples affirmatively contributed to its injuries.

Blackwell v. Vasilas

Vasilas buys residential real estate and fixes up and improves the property and then resells them. Although he performs some of the minor fix-ups and improvements himself, Vasilas is not a licensed contractor. In this case, Vasilas hired Gomez to perform stucco work and Blackwell to perform rain gutter work. Gomez was using scaffolding at the site. On the day of the accident, Blackwell arrived at the property with all of his own equipment necessary to install the rain gutters. Blackwell saw the scaffolding around a portion of the structure and continued working. The scaffolding did not look dangerous and Blackwell assumed it was safe although he does not know much about scaffolding. Blackwell used an extension ladder to access the roof. As he progressed around the building, Blackwell eventually reached that portion covered by the scaffolding. He leaned his ladder on the top rail of the scaffolding in order to access the roof. He then climbed up, but the scaffolding collapsed, and Blackwell fell 10 feet, landing on a pile of bricks and injuring himself.

Blackwell sued Vasilas alleging general negligence. The trial court granted the motion for summary judgment saying that the *Privette* doctrine precluded Blackwell's claim. Because Gomez did not have any license, Vasilas did not meet his initial burden of establishing that Gomez was an independent contractor. Thus, the *Privette* doctrine did not apply.

Education

McGee v. Balfour Beatty Construction LLC

James McGee and others challenged contracts for construction at several schools within the Torrance Unified School District. McGee alleged that the lease-leaseback agreements entered into by defendants were a sham designed to avoid the competitive bidding process.

The Court of Appeal affirmed in part stating that plaintiffs alleged that one of the defendants filled the role and position of officers and employees and agents of the District by providing preconstruction services and other aid. At this early stage, the allegation should have been credited.