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**NEW CASES AFFECTING THE
CONSTRUCTION INDUSTRY IN 2019**

Several new cases came out in 2018 that will potentially affect the way you do business in the future.

If you have any further questions or concerns 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.

Contracts

West Coast Air Conditioning Company v. California Dept. of Corrections

California's Department of Corrections solicited bids pursuant to Public Contract Code 10108 to update their air conditioning system at the prison. Both West Coast Air Conditioning Company and Hansel Phelps Construction submitted bids, but Hansel Phelps had the lower bid and was thus awarded the contract.

West Coast Air sought a writ of mandate for injunctive relief and asserted a promissory estoppel claim that included damages in the amount of their bid preparation costs against the Corrections Facility, alleging that Hansel's bid was defective and non-responsive so West Coast should have been awarded the contract. The trial court awarded them \$250,000 in promissory estoppel damages. The appellate court affirmed, stating that the issuance of a permanent injunction in favor of West Coast, on its own, without an award of the public works contract or an award of damages equal to its bid preparation costs, would result in an inadequate remedy.

Contracts

Nielsen Contracting Inc. v. Applied Underwriters Inc.

After Nielsen Contracting and T&M Framing sued several entities for allegedly fraudulent actions, the entities moved to compel arbitration pursuant to the arbitration provisions in their contract. Nielsen argued the provisions were unlawful and void. The trial court agreed, concluding that the provisions were unenforceable because defendants failed to file them with the Insurance Commissioner in violation of Insurance Code Section 11658 and title 10 of the California Code of regulations Section 2268.

The appellate court affirmed. A contract that is made in violation of a regulatory statute is generally void.

Contracts

SI 59 LLC v. Variel Warner Ventures, LLC

The purchaser of an apartment complex alleged that failure to waterproof a structural concrete slab prior to the signing of the purchase agreement caused water damage to the property and sued. The trial court found the purchaser's complaint was barred by a general release in the purchase agreement of negligence claims.

The Court of Appeal affirmed, stating that the general release in the purchase agreement barred a negligence claim against the general contractor. Civil Code Section 1668 that negates general release protection from liability does not apply where elements of sued- over tort include only "past events." This code applies only to concurrent or future torts. Here, the failure to waterproof was a past event because the failure had already occurred prior to the purchase agreement being signed. It does not matter that past negligence may have had future consequences.

Construction Defect

McMillin Albany LLC v. Superior Court

Homeowners brought a construction defect suit against the builder of their home, alleging the home was defective in nearly every aspect of construction, including foundations, plumbing, electrical, roofing, windows, flooring, and chimneys. The builder sought a stay so that parties could proceed through the Right to Repair Act process, but the trial court denied the motion.

The Appellate and Supreme Court concluded the Right to Repair Act was meant to partially displace common law remedies in cases where property damage had occurred. The Right to Repair Act is the exclusive remedy not just for economic loss but also for property damage arising from construction defect, so the court was required to order a stay until those procedures were followed and before homeowner's suit could proceed.

Payment Disputes

United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.

Coast Iron hired United Riggers to install metal work for a theme park ride. Coast Iron then withheld payment from United Riggers because of United Riggers' demand for additional amounts based on outstanding additional change order requests, and United Riggers sued for damages.

The Supreme Court held that the dispute exception provision in Code of Civil Procedure Section 8814(c) excuses payment to a subcontractor only when a good faith dispute exists over a statutory or contractual precondition to that payment, such as the adequacy of the construction work for which the payment is consideration. Here, there was no good faith argument over the

contractor's obligation to pay United Riggers, and the intervening delay punished the contractor for seeking additional compensation.

Evidence

Hart v. Keenan Properties, Inc.

A foreman's testimony regarding invoices purporting to show that defendant supplied asbestos-cement pipes led to a jury finding that defendant caused a pipelayer to develop mesothelioma through exposure to the asbestos products.

The court of appeal reversed the verdict because the invoices that the foreman based his testimony on were inadmissible hearsay because the foreman lacked personal knowledge about the statements. The wording on the invoices were thus out of court statements by a third party that were inadmissible in court.

Administrative Remedies

Contractors' State License Board v. Superior Court

After the Board filed an accusation against an electrical contractor for performing work without certification, the contractor filed a "Notice of Defense" asserting that the work its employees were performing did not require certification and argued the Board's interpretation of the Labor Code was erroneous.

While its administrative proceeding was pending with the Board, the contractor filed a complaint in court alleging the Board is enforcing Labor Codes illegally. The Court of Appeal held that the contractor could not maintain the filed action because it had not exhausted its administrative remedy, which is a prerequisite to judicial review by way of administrative mandate. The contractor never showed that the exhaustion would be futile or that the board could not provide an adequate remedy.

Administrative Remedies

JMS Air Conditioning & Appliance Service, Inc. v. Santa Monica Community College

Santa Monica Community College contracted with Bernards to construct a new facility. Bernards listed JMS in its bid to the District for heating and air-conditioning. Bernards then attempted to substitute JMS because JMS had allegedly "failed to perform its subcontractor obligations." JMS objected and triggered their right to a Section 4107 substitution hearing. The hearing approved Bernard's substitution request, so JMS filed a petition for writ of administrative mandamus and argued it was denied due process.

The court held that the subcontractor was entitled only to limited due process protections of notice and opportunity to be heard because the substitution decision did not substantially affect a fundamental vested right. Substantial evidence supported the hearing officer's approval of the substitution based on expert testimony.

Wages

Allied Concrete & Supply Co. v. Baker

A group of ready-mix concrete suppliers challenged California Labor Code 1720.9, which amended California's prevailing wage laws to include delivery drivers of ready-mix concrete. The Appellate Court held that ready mix drivers are more integrated into the construction process than other materials drivers and that they provide a material more important to public works projects than other materials, so they should be paid accordingly.

Thus, all contractors must meet the prevailing wage requirements for ready-mix concrete suppliers.

Tort

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.

A middle school student sued a construction company, alleging sexual abuse by a construction worker during a construction project at the school. The student's claims included a cause of action against the company for negligent hiring and supervising of the employee. The company's insurer sought declaratory relief, contending it had no obligation to defend or indemnify the company because the student's injury was not caused by an "occurrence" under the employer's commercial general liability policy.

The Supreme Court concluded that California law recognizes a cause of action for negligent hiring or supervision even when the employee acted intentionally or deliberately, so unless there is an applicable exclusion, employers can legitimately expect coverage for such claims under comprehensive general liability insurance policies.