

# Couch White, LLPs CONSTRUCTI

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## ON NOTES

### **COURT STRIKES AGENT-FOR-PAYMENT CLAUSE**

General contractors often insert pay-when-paid clauses in their agreements with subcontractors. The essence of a pay-when-paid clause is that the general contractor is not obligated to pay the subcontractor for work performed under the agreement unless the general contractor receives payment from the owner. The provision is troubling to subcontractors because it forces them to assume the risk that the owner will fail to pay the general contractor.

In West-Fair Electric Contractors v. Aetna Casualty & Surety Co., the state's highest court struck down pay-when-paid clauses finding that they violated public policy under the New York Lien Law. The court reasoned that such clauses require a subcontractor to waive its right to enforce a lien for non-payment based upon an owner's default since a lien cannot be enforced until a debt becomes due and payable.

The court in West-Fair failed to address a second issue in the case concerning whether a pay-when-paid provision affects a surety's

obligation to subcontractors under a payment bond. More specifically, the West-Fair court did not address whether a surety's liability to pay under its bond is contingent on the duty of the contractor to make payment. This issue was recently addressed by the New York Appellate Division, First Department.

Blandford Land Clearing Corp. v. National Union Fire Insurance Company of Pittsburgh, Pa., No. 2150-2150A, slip opinion (1<sup>st</sup> Dep't October 1999), arose out of the construction of a shopping center in the Bronx, New York. The plaintiffs were subcontractors hired by the general contractor, York Hunter of New York, Inc. (York Hunter@).

Pursuant to the terms of the subcontract agreements, York Hunter was designated as the agent of the project owner for the purposes of payment to the subcontractors. Payment to subcontractors was, thus, contingent upon the receipt of funds by York Hunter from the owner. Under their agreements, the subcontractors acknowledged that they were relying solely upon the credit of the owner and not the credit of York Hunter, as general contractor, for payment for their work.

After the subcontractors did not receive full payment, they commenced an action against York Hunter=s surety, National Union Fire Insurance Company (ANational Union@) seeking payment under a payment bond issued pursuant to York Hunter=s prime contract with the owner.

National Union moved for summary judgment claiming that its obligation under the payment bond was only as broad as York Hunter=s, and York Hunter was under no obligation to make payment to the subcontractors because it was only an Agent for payment.@ Plaintiffs cross-moved for summary judgment claiming that the Agent-for-payment@ provision was nothing more than a poorly disguised Apay-when-paid@ clause which had been declared void and unenforceable in West-Fair.

The trial court granted the surety=s motion to dismiss the subcontractors= complaints. On appeal, the Appellate Division reversed the trial court=s order and granted the subcontractors= cross-motion for summary judgment on the surety=s liability under its payment bond.

The Appellate Division rejected the surety=s interpretation of the contracts between York Hunter and the subcontractors. The court concluded that the designation of York Hunter as the owner=s Agent for payment@ impaired the contracts between itself and the subcontractors because its role as Agent for payment@ was inconsistent with its role as general contractor. The court stated that York Hunter could not act as a contractor for the purpose of directing plaintiffs= work under the subcontracts and as Agent for payment@ for the purposes of compensating plaintiffs. This would destroy the mutuality of obligation required to sustain a bilateral contract. In other words, the court found that the clause offended the mutual promises underlying every contractual relationship between contractors and subcontractors, which requires subcontractors to perform specified work and general contractors to pay for the work actually performed.

The court then determined that the plain language of the payment bond issued by National Union created an independent obligation on the surety=s part to pay for labor and materials

furnished in connection with the Project.

The holding in Blandford is important because it establishes that: (1) agent-for-payment provisions in subcontract agreements are void and unenforceable; and (2) while a surety may avail itself of a general contractor=s defenses to payment, its ultimate responsibility to make payment to subcontractors is independent and will be dictated by the terms of its payment bond.

### **COURT DISMISSES AGE DISCRIMINATION CLAIM**

Although this article is not construction related, it is business related and, in the past, our clients have asked us to assist them with employment related issues in the workplace. One Ahot button@ issue is age discrimination. A recent decision in the New York Appellate Division, Third Department, sets forth the burden that a plaintiff needs to satisfy in order to recover under an age discrimination claim. Hardy v. General Electric Company, 705 N.Y.S.2d 97 (3<sup>rd</sup> Dep=t 2000), involved an age discrimination action commenced by a 58-year-old employee against, General Electric (AGE@). Plaintiff was an

### **QUOTATION OF THE MONTH**

It is not the critic who counts, not the man who points out how the strong man stumbles or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly, who errs and comes up short again and again because there is no effort without error and shortcomings, who knows the great devotion, who spends himself in a worthy cause, who at best knows in the end the high achievement of triumph and who at worst, if he fails while daring greatly, knows his place shall never be with those timid and cold souls who know neither victory nor defeat.@

-Theodore Roosevelt

engineer in the research laboratory at



GE=s Corporate Research and Development Center in Niskayana, New York. In August, 1993, plaintiff was discharged from GE. In May, 1995, plaintiff commenced an action against GE alleging that he was terminated because of his age in violation of New York=s Human Rights Law and the Age Discrimination in Employment Act of 1967 (AADEA@).

GE moved for summary judgment seeking the dismissal of the complaint on the ground that the plaintiff had failed to establish a prima facie case of age discrimination. A prima facie

(i.e., over 40 years of age); (2) he was actively or constructively discharged; (3) he was qualified to hold the position; and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination.

Id. at 99-100.

Once the plaintiff has demonstrated a prima facie case@ of age discrimination, the burden then

case@ means that plaintiff has alleged sufficient facts to require a trial on the claim. GE argued that the plaintiff was not terminated because of his age, but rather for legitimate non-discriminatory reasons.

The trial court denied GE=s motion to dismiss the age discrimination claim. The court found that the plaintiff raised issues of fact as to whether his termination was age-related. The Appellate Division, Third Department reversed the trial court and granted GE summary judgment dismissing the claim.

The New York Human Rights Law and federal ADEA prohibit employers from terminating employees on the basis of age. In the Hardy case, the Appellate Division set forth the burden that a plaintiff must satisfy in order to prove age discrimination. The Appellate Division stated the rule as follows:

To recover under his age discrimination claim, plaintiff must first establish by a preponderance of the evidence . . . that (1) he is a member of a protected class

shifts to the employer to set forth legitimate and non-discriminatory reasons for the plaintiff=s termination.

In Hardy, the Appellate Division concluded that even if it were to assume that plaintiff established a prima facie case of age discrimination, defendant GE met its burden by demonstrating an age-neutral explanation for plaintiff=s discharge. GE demonstrated that its workforce in general was being reduced for economic reasons and that plaintiff=s termination in particular was based on his own poor job performance. The court concluded that these were legitimate and non-discriminatory reasons for plaintiff=s discharge.



The key for GE=s defense in this case was that it was able to produce

records demonstrating that the plaintiff was not performing his job well. Those records came in the form of periodic evaluation forms that showed that plaintiff was not doing good work relative to other employees in the same or similar positions. Without such records, GE could have had a difficult time demonstrating a legitimate basis for the plaintiff's discharge.

After an employer claims non-discriminatory reasons for a plaintiff's termination, the burden then shifts back to the plaintiff to demonstrate that the employer's reasons were merely a pretext or cover-up for age discrimination. More specifically, in order to defeat a properly supported summary judgment motion in an age discrimination case, the plaintiff must demonstrate that there is a material issue of fact as to whether (1) the employer's asserted reason for termination is false or unworthy of belief and (2) more likely than not the employee's age was the real reason. @ Id. at 101. The plaintiff's burden has been even further refined to require that the plaintiff establish that the employer did not honestly believe the reasons it gave for terminating him and that age tipped the balance in favor of discharge. @ Id. In Hardy, the Appellate Division concluded that plaintiff failed to offer evidence demonstrating that the non-discriminatory reasons demonstrated by GE were not justified.

The bottom line is that it is unlawful to terminate employees on the basis of their age. The law does not, however, prohibit the termination of

employees where they are substandard performers or the termination is necessary for economic reasons. Your company should be sure to maintain records of employee performance and of any economic reasons for downsizing so that, if necessary, it can successfully

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defend an age discrimination claim.