Construction Law Newsletter

June 2024

Firm News

Welcome to the Team

Please join us in welcoming our new attorneys, Brianne Scott, Kristin Lechowicz, Rachell Horebenko, and Matthew Hobson.

Illinois & Indiana

With 15 years of dedicated experience, Brianne focuses her practice in general liability. She handles litigation in the areas of premises liability, slip and fall, subrogation, and transportation common carrier claims.

Illinois

Kristin focuses her practice on workers' compensation defense. Her experience representing both employees and employers in workers' compensation claims gives her a unique perspective on strategizing and resolving claims.

Rachell focuses her practice in workers' compensation and general liability. Prior to joining Downey & Lenkov, Rachell was a sole practitioner where she gained extensive experience in real estate, estate planning, and corporate law. In addition to her law practice, Rachell is a licensed real estate broker and has acted as a member of the Mainstreet Association of Realtors Professional Standards Committee.

Indiana

Mat concentrates his practice in workers' compensation and general liability. He is a dedicated attorney who provides unique strategies and effective counsel to his clients.

Downey & Lenkov Celebrates International Women's Day

We celebrated the remarkable women of Downey & Lenkov, acknowledging their invaluable contributions of intelligence, resilience, and unwavering determination to our firm.

New Indianapolis Office

Our Indianapolis office has moved! We have relocated to Parkwood Crossing at 450 East 96th St, Ste 500, Indianapolis IN 46240. Our service, phone number and fax number remain the same.

Thank you for your continued confidence in our firm. We are always available to assist with your claims.

Frank Swanson Named Co-Chair of the CBA Construction Law Subcommittee

Associate Frank Swanson has been named Co-Chair of the Chicago Bar Association Construction Law Subcommittee for 2024 - 2025.

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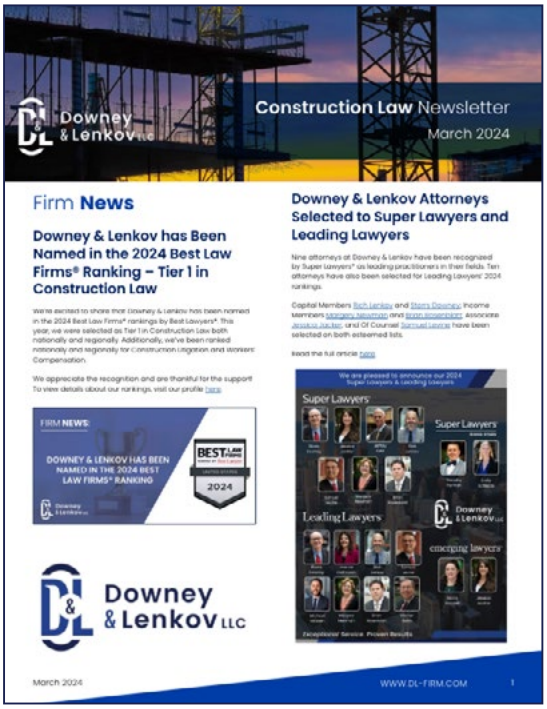
March 2024 Construction Newsletter



In our March 2024 newsletter, we covered firm news, IL CGL coverage analysis in construction case, independent contractor classification: DOL's new rule, and much more.

Legal **Updates**

Effect Of Termination Of An Arbitration Prior To Award

By: Werner Sabo

What happens if the parties abandon an arbitration? Can one of the parties then go to court and sue the other, or start up a new arbitration? This issue was addressed in *Flynn v. Nappa Constr. Mgmt., LLC*, 2024 R.I. Super. LEXIS 17 (Feb. 16, 2024). This case stems from a dispute among the parties due to the construction of an automotive repair facility. Flynn, owner of the facility hired Nappa as the general contractor, using an AIA form contract, A101-2007. After work started, disputes arose concerning the flooring and foundation work. Flynn directed Nappa to cease all work and Nappa notified Flynn that they were in breach of their contract. Nappa then terminated the contract.

In the interim, Flynn hired experts to evaluate the work. The experts concluded that the existing slab and structural fill needed to be removed, causing Flynn to file suit in 2013 against Nappa. Nappa then filed a demand for arbitration in early 2014. The arbitrator issued an award the following year which was confirmed following an appeal. The order placed the case back to the lower court which, in 2017, vacated the award and moved the matter to its original arbitrator.

In this later arbitration proceeding, Flynn raised the legal issue of the capacity of Nappa. It appears that the parties in the arbitration agreed that it did not make sense to continue with the arbitration. The arbitrator issued this ruling in 2020:

"In its filing, Flynn contends that Nappa is out of business, does not legally exist, and thus is not an entity against which a remedy can be enforced. Nappa disagrees with *Flynn's contention*, but nonetheless agrees, that, as Nappa is out of business, and has no assets, it does not make sense to continue with the arbitration process. Whereas both parties agree that the arbitration process should not be continued, this Arbitration is hereby terminated." *Id.*

In early 2023, Flynn filed their Sixth Amended Complaint against numerous parties in court. This was followed by a motion for summary judgment brought by Nappa and the other defendants. Nappa argued that the AIA contract mandates that the method of binding dispute resolution is arbitration and that it is entitled to judgment as a matter of law. The argument is that Flynn abandoned the contractually agreed arbitration when they stipulated to terminate it and, as such, is prevented from continuing with the instant litigation. Flynn argued that vacating the arbitration did not affect the litigation. They also argued that the matter could be sent to new arbitration.

The court examined the contract and found that, based on the unambiguous language of the construction contract, the sole method of dispute resolution between the parties for any claim is arbitration. The question for this court was whether the arbitration could be reinstated after its termination. The court found that the parties proceeded to arbitration and concluded that Nappa's revocation of certificate of organization and lack of assets were grounds to terminate the arbitration. "Unlike termination for failure to pay arbitration fees, this arbitration actually began and was concluded by stipulation. The court went on to state that regardless of whether the parties agreed Nappa did not exist, there is no arbitration to return this case to and parties may not avoid resolution of live claims through compelling a new arbitration proceeding after having let the first arbitration proceeding fail. This is true even if the termination was based on a mistake of law."

The court granted the motion for summary judgment for all counts. This terminated the matter for not only Nappa but also various other parties. While this result may seem harsh to the owners, the lesson is that one must be very careful to examine all ramifications before agreeing to terminate an arbitration before a final award is issued.

Killer Contract Clauses

By: Margery Newman

Construction contract clauses are often a trap for the unwary. A beneficial clause for a general contractor may be extremely detrimental to several subcontractors. The following clauses taken from general contractor/subcontractor contracts are what are often referred to as "killer clauses." Keep in mind that these clauses are helpful for general contractors.

Contract Scope Provisions:

- Subcontractor shall complete flooring work in full compliance with all plans and specifications for this project as outlined in the prime contract and division A of the specification all per applicable codes.

Response:

- Subcontractor's bid on plans and specifications. If these documents violate the local building code, that should be an architect's problem, not the subcontractors.

Omissions Provisions:

- Omissions from the drawings or specifications or the misdescription or insufficiency of details relating to the subcontractor's work, which are necessary for the subcontractor to carry out the intent of the drawings and specifications, or that are customarily performed by the subcontractor, shall not relieve the subcontractor from being responsible for and performing such omitted, misdescribed or insufficient details relating to of the subcontractor's work. The subcontractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

Response:

- Again, subcontractors bid on the plans and specifications provided to them. It is not a subcontractor's job to include in its bids the amounts necessary to cover errors or omissions in the architect's plans and specifications.

Schedule of Work:

- Subcontractor shall proceed with subcontractor's work per contractor's schedule as amended by contractor from time to time. Contractor shall have the right to direct the sequence and pace of subcontractor's work, including overtime, without monetary compensation to subcontractor.

Response:

- Any change to the project schedule or sequence of the work can have a serious financial impact on the subcontractor. These schedule changes cause inefficiency and delays to the subcontractor's work. All acceleration, delay and interference impacts should be reimbursed to the subcontractor.

No Damages for Delays Clause:

- Owner shall not be liable to the contractor and/or any subcontractor for claims or damages or monetary claims of any nature caused by or arising out of delays. The sole remedy against the owner for delays shall be the allowance to claimant of additional time for completion of work, the amount thereof to be determined by the architect in accordance with the foregoing provisions of the above subparagraphs.

Response:

- When a project is delayed due to no fault by a subcontractor, there are monetary changes incurred by the subcontractor such as increased costs for labor and material. Merely obtaining a corresponding extension of time without payment for delay damages is detrimental to the subcontractor.

Changes, Claims and Delays:

- When the contractor so orders in writing, the subcontractor, without nullifying this agreement, shall promptly and without delay, make all changes in the subcontractor's work that the contractor determines are within the general scope of this agreement, and whether disputed or otherwise.

Response:

- This forces a subcontractor to perform work that may not be included in its contract.

Project Coordination:

- The subcontractor shall coordinate its work with that of other subcontractors, provide scheduling input, and comply with the general contractor's scheduling requirements, as they may be revised and issued from time to time.

Response:

- A subcontractor has no authority or ability to "coordinate" its work with that of other subcontractors. That is the job of the general contractor. All a subcontractor can do is "cooperate" with other trades to perform the work appropriately.

Right of Set-Off:

- Contractor may withhold and unilaterally deduct amounts otherwise due under this agreement, or any other agreement in which either contractor or subcontractor has an ownership interest, sub-affiliation, or corporate affiliation ("other agreements"), to cover contractor's reasonable estimate of any costs (including reasonable overhead and profit) damages or liability contractor has incurred or may incur for which subcontractor may be responsible for under this agreement or other agreements, and to reimburse contractor for contractor's costs associated with performing subcontractor's work before subcontractor's default.

Response:

- Subcontractors should not allow money to be held on job "A" if there is a dispute on job "B." That only results in both jobs being underwater.

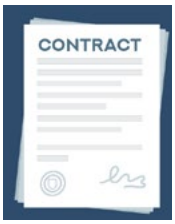
- There are many other clauses that are problematic for subcontractors. Reading and understanding all of the obligations contained in a Subcontractor Agreement is critical to avoiding unexpected liability.

Mechanic's Lien Act

By: Samuel Levine

The Mechanic's Lien Act is strictly construed regarding the requirements upon which the right depends. A mechanics lien is declared valid "only if each of the statutory requirements has been scrupulously observed." One of those requirements is that the claim for lien contains a brief statement of the contract. The requirement for a brief statement of the contract is a trap for the unwary.

In *Burrink Commercial Services v. New Life Covenant Church* 2024 IL App (1st) 220778U, the Court dismissed a complaint to foreclose a mechanics lien as factually insufficient because the complaint improperly characterized two contracts as one. The case is a Rule 23 Opinion which should have been a published opinion.



Plaintiff ("Burrink") was a subcontractor to Tower Contracting, LLC ("Tower Contracting") for a construction project for New Life Covenant Church. Burrink and Tower Contracting came to an oral agreement for Burrink to perform site preparation work on a time and material basis. The oral agreement was reduced to writing a short time after August 1, 2017, in a document entitled "Purchase Order". During the site preparation tasks, Tower Contracting and Burrink discussed other tasks that were not originally contemplated at the time the original agreement was negotiated. Tower Contracting then prepared a written subcontract regarding $560,000 worth of "Contract Extras" that included services such as backfilling surfaces, installing sanitary and storm water sewers and irrigation lines, digging retention ponds, and placing seed mats. Burrink executed the subcontract on August 3, 2017, and Tower Contracting executed it on October 9, 2017.

The Complaint alleged that by January 26, 2018, it had completed all of the " Purchase Order tasks it was allow(ed) to perform and some of the "Contract Extras." The Complaint alleged that Burrink created a permanent and valuable improvement and enhancement consisting of $353,972 in value attributable to the Purchase Order tasks and $85,539.50 in value attributable to the "Contract Extras". After allowing for credits respectively paid pursuant to the "Purchase Order" and "Contract Extras" there was a balance due of $234,104.78.

The Court found that the two contracts were not an original agreement and its change order. They were two independent and unconnected contracts. The Court distinguished between the purchase order and the "Subcontract". It relied upon Cambridge Dictionary to refer to a purchase order as "a document that asks a company to supply goods or services and gives details such as the price to be paid and the method and date of payment,". The four-page Purchase Order consisted of a considerable, one-page list of tasks and payment terms, some boilerplate language about insurance coverage, and a half-page list "break(ing) out" the costs.

On the other hand, the Court looked to Merriam Webster's Online Dictionary to define a "Change Order" as "a written alteration to a previously signed contract for work (as in construction)". The Burrink "Subcontract was a formal and detailed document that consisted of 26 typewritten pages with attachments, complete sentences and punctuations, numbered articles, numbered sections, subtitled paragraphs, and consecutive numbers for every line of every page of the contract." The Court found that the "Subcontract" was not a change order to the Purchase Order because it had no impact on the earlier contract. It did not indicate that the parties were altering an existing arrangement. The second agreement was not titled change order or a contract amendment. Besides the contents of the subcontract, it did not modify the scope of any work, change any services, revise or start any completion date, or update any prices for fees previously agreed upon by the parties.

In conclusion, Burrink simply muddled together two unconnected agreements as if they were a single but modified contract. The result was a substantial and material departure from Section 7 requirement that the lien claim includes "a brief statement of the contract."

The case is a lesson in contract draftsmanship. Change order documentation is often loosely drafted. There is a need to connect a change order to the contract by stating how it modifies the scope of work, changes services, revises the start or completion date, updates the previously agreed upon start or completion date, or some other connection between the original agreement and change order. The case is also a reminder that the statute is strictly construed regarding those requirements upon which the lien depends.

Newsletter **Contributors**,

Samuel Levine, Margery Newman and Werner Sabo contributed to this newsletter.

View more information on our

Construction Law practice

Our other practices Include:

- Appellate Law
- Business Law
- Condominium Law
- Entertainment Law
- General Liability
- Healthcare Law
- Insurance Law
- Intellectual Property
- Labor & Employment Law
- Products Liability
- Professional Liability
- Real Estate
- Workers' Compensation