

Design and Construction Management Professional Reporter

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World Trade Center East
Two Seaport Lane
Boston, MA 02210

617 406 4500 main
617 406 4501 fax

www.donovanhatem.com

One Penn Plaza
Suite 3324
New York, NY 10119

212 244 3333 main
212 244 5697 fax

DONOVAN | **HATEM** LLP
counselors at law

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Structural Engineer Not Liable For Injuries Caused By A Dangerous Construction Technique Where Contract Provisions Disclaim Liability And The Design Did Not Require Means And Methods Of Construction

By Daniel C. Poteet, Esq.

N MACINNIS V. WALSH BROTHERS, INC., 20 MASS. L. RPTR. NO. 28, 635 (May 15, 2006), the Middlesex County Superior Court granted the defendant structural engineer's motion for summary judgment against negligence-based claims of wrongful death and injury asserted by the estate of a worker killed by a falling steel beam at a construction site.

The court found that the design professional owed no duty to the construction worker. In reaching its conclusion, the court relied principally on the contracts between the engineer and the project architect, between architect and owner, and between the owner and general contractor. The court also considered the extent to which the structural steel design required special construction methods.

The court found that the design professional owed no duty to the construction worker.

The case arose when Bernard MacInnis ("Mr. MacInnis") was killed by a steel beam that fell from the eighth floor of the Yawkey Center for Outpatient Care at Massachusetts General Hospital. Subsequently, an Occupational Safety and Health Administration ("OSHA") citation was issued that indicated improper techniques had been used to lift the beam that fell. Mr. MacInnis' estate filed negligence claims for wrongful death and pain and suffering against the structural engineer, which was engaged by the project architect. The motion for summary judgment, prepared and argued by Donovan Hatem LLP, argued that the structural engineer owed no duty to Mr. MacInnis.

The court first evaluated the contract between the structural engineer and the project architect. The contract provided that the structural engineer had

no responsibility or duty for guaranteeing, warranting, directing or superintending the contractors' work methods, safety of the job site, process, failure to carry out the work in accordance with contract requirements... or any other aspect of construction for which the contractors have responsibility.

Mr. MacInnis' employer, a subcontractor to Walsh Brothers, Inc., the general contractor, executed a contract stating that it would bear responsibility for the "safe performance of all aspects of the Work..." The court determined that these two provisions insulated the general contractor in most circumstances from any duty to a construction worker.

The court then addressed the estate's argument that the Massachusetts State Building Code, 780 CMR 2203.1, and its incorporation of certain American Institute of Steel Construction ("AISC") standards, created a duty on the part of the engineer. Because the code addresses steel fabrication standards, rather than design standards, the court concluded that no duty was owed by the engineer to a construction worker – at least where the design did not require any unusually risky installation or other construction techniques. Because there was no evidence here that the steelwork design necessitated the techniques in use at the time of the accident and the contract provisions were clear that the engineer was not responsible for the particular methods used, the court concluded that summary judgment was appropriate and dismissed the case against the structural engineer. ■

Notes:

Ohio Appellate Court Distinguishes Spearin Doctrine And Reverses Award Of Delay Damages To Lead Contractor

By Kathryn E. Mayforth, Esq.

ON JULY 28, 2005, AN OHIO APPELLATE COURT issued a ruling implicating long-established delay damages principles and altering the teachings of the *Spearin* Doctrine. In *Dugan & Meyers Construction Co., Inc. et al. v. State of Ohio Department of Administrative Services, et al.*, 162 Ohio App. 3d 491 (2005), the Tenth District Court of Appeals reversed in part and remanded the decision of the Court of Claims, holding that proof of numerous contractor requests for information may be insufficient to support a contractor's recovery of delay damages where the contractor fails to provide an identifiable design defect.

In the earlier case of *United States v. Spearin*, 248 U.S. 132 (1918), the United States Supreme Court awarded damages to a contractor for delay overruns incurred during the construction of a dry-dock at the Brooklyn Navy Yard in New York City. The Court held that if a contractor is contractually bound to build according to plans and specifications prepared by the owner, the contractor is not responsible for the consequences of defects in the plans and specifications. Further, the liability of the owner is not overcome by contract clauses requiring builders to visit the site, check plans and inform themselves of the requirements of the work. The "Spearin Doctrine," as this decision became known, effectively established a "warranty of constructability" running from the owner to the contractor, and has been considered controlling law in the State of Ohio, among others, until the recent decision of *Dugan & Meyers*.

Dugan & Meyers involved the construction of several buildings that made up Phase II of the Fisher College of Business at Ohio State University. The parties entered into a contract wherein Dugan & Meyers Construction Company was to act as the lead contractor on the project. Numerous Requests for Information (176 in a four-month period), Field Work Orders, and Architect Supplemental Instructions were issued during the course of construction. Delays occurred, and Dugan & Meyers' lead contractor duties were eventually re-assigned to another company by the university. Two of the buildings were ultimately completed on time, while the third was not completed until roughly six months after the contractual completion date. As a result, the university backcharged Dugan & Meyers the amount of additional compensation paid to the replacement contractor and assessed liquidated damages.

The "Spearin Doctrine," as this decision became known, effectively established a "warranty of constructability"

Dugan & Meyers then filed a claim seeking compensation for its contract balance, additional amounts for alleged delay damages and a reversal of the liquidated damages assessment. When the university rejected this claim, Dugan & Meyers brought suit in the Ohio Court of Claims (as required for claims for damages against a State entity). The Court of Claims, invoking *Spearin*, denied the State liquidated damages and awarded Dugan & Meyers over \$2 million, constituting the balance of the contract, and delay damages.

On appeal, the Ohio Court of Appeals held that the implied warranty of the adequacy of the plans and specifications, identified in *Spearin*, was not appropriately applied in this instance by the Court of Claims. The court found that the record failed to demonstrate that the substantive concerns addressed by the numerous requests for information issued by Dugan & Meyers rendered the plans unbuildable or inadequate to accomplish the purpose of the contract. Therefore, the contractor was not entitled to delay damages resulting from design errors and omissions. Additionally, the appellate court held that the owner could recover liquidated damages for the delay, where the contractor failed to request extensions of time in writing as the contract required.

This case is currently on appeal before the Ohio Supreme Court. Regardless of its outcome, *Dugan & Meyers* suggests that courts will hold contractors to proving that the quality (not just the quantity) of design errors and omissions justify a delay damages claim. Additionally, contractual requirements for the submission of timely written time extension requests will be enforced. ■

Notes:

Tolling Of The Statute Of Limitations For Professional Malpractice Actions In New York: The Continuous Representation Doctrine

By Warren D. Hutchison, Esq.

THE SUPREME COURT OF NEW YORK, Appellate Division, Third Department, recently applied the continuous representation doctrine to toll the statute of limitations in a professional malpractice action against an engineering firm in favor of the firm's client.

In the Matter of Arbitration between Clark Patterson Engineers, Surveyor, and Architects, P.C. and City of Gloversville Board of Water Commissioners, 2006 N.Y. App. Div. LEXIS 333 (Jan. 19, 2006) involved an arbitration demand by the City of Gloversville Board of Water Commissioner ("City") to resolve a dispute with Clark Patterson Engineers, Surveyor, and Architects, P.C. ("Clark"), the successor in interest to Smith & Maloney, P.C. ("Smith") (collectively "Smith/Clark"). In 1991, the City and Smith/Clark entered into a general agreement for professional services for services to be provided "as requested (by the City) from time to time." *Id.* at *1. This agreement contained an arbitration clause, which was to govern the resolution of any disputes arising between the parties. In 1996, the City asked Smith/Clark to design and administer the Jackson Summit Reservoir Spillway Improvement Project ("Project") and hired a general contractor for the Project. In August,

1998, before the Project was completed, the City terminated the general contractor because of construction defects and suspended the Project. After the Project was suspended, Smith/Clark provided the City with various professional services, including "assessments of the (construction) defects and their causes in 1998 and 1999, a proposal to remedy the defects and complete construction in 1999, estimates of costs of repairs in 2000 and 2001, . . . and a further field investigation of (the general contractor's work) in April 2002" to aid in the City's lawsuit against the general contractor. *Id.* at *1-*2. Eventually, the City settled its claim against the general contractor and served a demand

for arbitration upon Smith/Clark on March 31, 2004, seeking monetary damages for Smith/Clark's "alleged malpractice in designing and supervising the Project." *Id.* at *2.

The New York Supreme Court (trial court) ruled in favor of Smith/Clark and stayed the arbitration on the grounds that the City's demand for arbitration was untimely. The court accepted Smith/Clark's argument that the three year statute of limitations that applies to professional malpractice claims accrued in 1998 when work on the Project was suspended. Thus, the demand for arbitration filed in 2004 was outside of the three year statute of limitations. On appeal, the Appellate Division reversed

The New York Supreme Court (trial court) ruled in favor of Smith/Clark and stayed the arbitration on the grounds that the City's demand for arbitration was untimely.

the trial court, thus allowing the City to arbitrate its claims against Smith/Clark.

In reversing the trial court, the Appellate Division applied the continuous representation doctrine to toll the running of the three year statute of limitations applicable to professional malpractice claims. In New York, as in other states, the continuous representation doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Id.* at *2 (citing *Shumsky v. Einstein*, 96 N.Y.2d 164, 167 (2001)).

The court ruled that to establish the applicability of the continuous representation doctrine, the City had to prove that: (1) the City relied upon the continued professional services of Smith/Clark as it sought to identify the nature of the Project's construction defects, remedy their causes and recover damag-

es from the general contractor as the party believed to be responsible; (2) the services provided by Smith/Clark were sufficiently related to the Project upon which the City's malpractice allegations were based; and (3) the City could not reasonably

The Appellate Division, in finding that the City [satisfied] the continuous representation doctrine, reversed the lower court's finding and allowed arbitration of the dispute.

be expected to jeopardize its case against the general contractor by challenging Smith/Clark's expert opinions so long as it continued to rely on Smith/Clark for these professional services. *Id.* at *2-*3. The Appellate Division, in finding that the City proved each of these elements, thus satisfy-

ing the continuous representation doctrine, reversed the lower court's finding and allowed arbitration of the dispute.

Accordingly, where Smith/Clark provided the City with continuing professional services related to the Project, the City could not be expected to accurately assess a cause of action against Smith/Clark for its services related to the Project. For this reason, the City's statute of limitations was tolled until Smith/Clark ceased providing professional services related to the Project. Accordingly, the demand for arbitration, made in 2004, was not untimely. ■

Design Specifications Are A Matter Of Professional Judgment And Do Not Trigger An Action In Negligent Misrepresentation

By Douglas M. Marrano, Esq. and Philip W. Mone

IN A NEGLIGENT MISREPRESENTATION CLAIM against an architect arising out of a construction project, the Superior Court of Massachusetts recently found that the plaintiff could not assert a negligent misrepresentation claim when the statements at issue were not based on facts susceptible of actual knowledge, but were merely a matter of professional judgment.

In *KDK Enterprises v. Peabody Constr. Corp. Inc.*, an architectural firm entered into a contract with a municipality to provide design and contract administration services related to the construction of three public schools. The plaintiff was the painting subcontractor on the project, and had no contract with the architect.

The specifications in the contract documents concerning paints and coating called for a specific drywall finish to which the plaintiff would then apply two coats of paint. Near completion of the project, a punch list was generated which contained items relating to painting which the general contractor assigned to the painting subcontractor to complete. The painting subcontractor objected, claiming that some of the punch list items were beyond the scope of the contract documents, but nevertheless completed the items.

The plaintiff may recover economic losses from one who has made a negligent representation to him.

Among the punch list items which the painting subcontractor completed was repainting of certain walls to which the drywall subcontractor had applied patches. The painting subcontractor asserted that the drywall patches were applied to achieve a different level of drywall finish than the original specifications had required. The painting subcontractor claimed the drywall specifications were negligent misrepresentations by the architect, entitling it to reimbursement of the additional costs incurred to complete the punch list and for lost profits for other jobs for which the painting subcontractor was unable to bid.

Where the plaintiff seeks recovery for purely economic losses and the defendant lacks contractual privity with the plaintiff, the Economic Loss Doctrine should bar a claim for negligence. *Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103,107 (1989). However, a narrow exception to the doctrine has been carved out for claims of negligent misrepresentation. *Craig v. Everett M. Brooks Co.*, 351 Mass. 497, 499-501 (1967). Thus, plaintiff may recover economic losses from one who has made a negligent representation to him. *Id.*

In its decision, the Superior Court laid out the legal standard which needs to be satisfied in order to recover for negligent misrepresentation. In this 6-point standard, the plaintiff must prove that the defendant (1) in the course of his business, (2) supplied false information for the guidance of others, (3) in their business transactions, (4) causing the resulting in pecuniary loss to those others, (5) by their justifiable reliance upon the information, and (6) with failure to exercise reasonable care or competence in obtaining or communicating the information. *Nota Constr. Corp. v. Keyes Associates*, 45 Mass. App. Ct. 15, 19-20 (1998).

The Superior Court noted that false information in an architect's plans and specifications is only actionable as a misrepresentation if the information concerns a matter that is "susceptible of actual knowledge." *Id.* at 20-21. Conversely, information provided by an architect that concerns a matter of judgment is not actionable as misrepresentation. See *Zimmerman v. Kent*, 31 Mass. App. Ct. 72, 77 (1991).

The Superior Court held that the determination as to what combination of drywall surface would produce an acceptable finish using the stated specifications was a matter of the architect's judgment. In preparing such a specification, an architect is exercising his professional opinion, given his education, training and experience. In comparison, statements concerning the location and quality of subsurface ledge, or the designation of an area of land for the building of a road, are not matters of opinion or judgment, but rather are issues "susceptible of actual knowledge." *Nota*, 45 Mass. App. Ct. at 15; *Craig*, 351 Mass. at 497. Thus, the painting subcontractor's claim failed because the alleged "misrepresentation" was a matter of the architect's judgment rather than a matter susceptible of actual knowledge.

The Superior Court, citing to *Klein v. Catalano*, 386 Mass. 701, 719 (1982), also discussed the level of care required of architects in performing professional services. An architect impliedly promises to exercise a standard of reasonable care that is required of members of his profession. *Id.* The court then quoted directly from *Klein*, noting:

Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Id., quoting *Mounds View v. Walijarvi*, 263 N.W.2d 420, 424 (Minn. 1978).

Thus, the painting subcontractor's claim that the architect failed to exercise reasonable care in determining what level of drywall surface would produce an acceptable surface finish, in view of the painting and critical lighting specifications, was nothing more than a claim in negligence and thus, as previously discussed, was barred by the Economic Loss Doctrine.

The court also granted summary judgment to the architect on the plaintiff's claim for violation of G.L. ch. 93A (Massachusetts Unfair and Deceptive Trade Practices Act). The court held that while a claim for negligent misrepresentation may be actionable under ch. 93A, the claimed conduct in this case was not actionable under negligent misrepresentation, leaving the plaintiff with a claim in negligence. The court ruled the negligence claim did not amount to unfair or deceptive conduct under GL. ch. 93A.

The decision in *KDK Enterprises v. Peabody Constr. Corp., Inc.* is important because it adds greater definition to a narrow but often litigated exception to the Economic Loss Doctrine. It establishes that even when architect's specifications lack perfection and lead to cost over-runs for third parties, as long as the specifications were based on judgment as opposed to facts susceptible of actual knowledge, the third party is barred from relief because of the Economic Loss Doctrine. ■

Court Of Appeals Of Georgia Re-Affirms The Viability Of The Negligent Misrepresentation Exception To The Economic Loss Rule

By Alberto G. Rossi, Esq.

RELYING ON THE NEGLIGENT MISREPRESENTATION EXCEPTION to the economic loss rule, the Court of Appeals of Georgia in *Mactec Engineering and Consulting of Georgia, Inc. v. City of Cairo*, 2006 Ga. App. LEXIS 365, at *1 (Mar. 28, 2006), recently affirmed recovery argument of a design professional arising out of deficiencies in a wastewater treatment facility.

In 1993, the City of Cairo ("City") contracted with Hightower Consulting ("Hightower") to design and build a land application system ("LAS") -- an irrigation system that collected wastewater, treated it and thereafter disposed of it in another tract of land. The City requested that Hightower solicit proposals from engineering firms to conduct permeability tests on a 900-acre tract of land for which the City had an option to purchase. According to the "Request for Proposals to the City of Cairo," the selected engineering firm was obliged to comply with certain Georgia Environmental Protection Division ("EDP") guidelines. Law Engineering and Environment Services, Inc. ("LEG"), now known as Mactec Engineering and Consulting of Georgia, Inc., responded to the request, and the City accepted its proposal, including LEG's statement of General Conditions, which contained a paragraph that limited LEG's liability to \$50,000.

LEG moved for summary judgment, and for directed verdict at trial, asserting that the City's claims were barred by both the statute of limitations and the economic loss rule.

After conducting various soil permeability tests, LEG reported that the entire 900-acre tract of land was permeable for up to 2.0 million gallons of treated wastewater per day and thus suitable for the LAS. The City purchased the land and Hightower was given permission to begin construction of the LAS. Hightower finished construction of the LAS in early 1998. Soon thereafter, the land's surface area became saturated causing the water to runoff in all directions.

To identify and remedy the problem, the City retained both an engineering expert and an expert in soil science. After investigating the site, both experts concluded that LEG had deviated from the Georgia EDP guidelines in conducting its soil permeability assessment. In August 2002, the City filed suit against both Hightower and LEG alleging, among other theories, negligent misrepresentation.

LEG moved for summary judgment, and for directed verdict at trial, asserting that the City's claims were barred by both the statute of limitations and the economic loss rule. In the alter-

native, it argued that any recovery on the part of the City was limited to \$50,000 pursuant to paragraph 5 of the "Terms and Conditions" of the contract. The trial court denied both motions and the jury held both defendants liable, apportioning the damages as follows: \$50,000 to LEG and \$1,031,057.50 to Hightower.

After the jury verdict, the City filed a motion for additur claiming that paragraph 5 of the "Terms and Conditions" page of the contract was unenforceable as a matter of law because it was in direct conflict with several city ordinances. The trial court denied that motion and the City appealed the decision. On appeal, the Court of Appeals affirmed the trial court's ruling because the City "failed to properly except to the jury's consideration of [paragraph 5] as a matter of law." *Mactec Engineering and Consulting of Georgia, Inc.*, 2006 Ga. App. LEXIS 365, at *13.

LEG also appealed. LEG argued that the trial court erred by not granting it judgment as a matter of law on either its statute of limitations or economic loss argument. With respect to the former, the Court of Appeals sustained the trial court's denial because any pecuniary losses would not have been discovered with certainty prior to March 1998 and LEG had entered into a series of agreements tolling the statute of limitations period from March 2001 until August 2002. Thus, the City was within the four year limitations period for actions alleging damages to realty.

With respect to the economic loss defense, the Court of Appeals quoted a previous decision, in which it defined the "misrepresentation exception" as follows:

One who supplies information during the course of his business, profession, employment, or in any transactions in which he has pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information

was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly.

Holloman v. D.R. Horton, Inc., 241 Ga. App. 141, 148 (524 S.E.2d 790) (1999). Finding that LEG's statement regarding the suitability of the land for filling the wastewater fell within that language, the Court of Appeals affirmed the verdict.

This decision shows the successful use of the negligent misrepresentation theory of recovery to avoid the bar of the economic loss doctrine. ■

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Any inquiries should be directed to David J. Hatem, PC, Donovan Hatem LLP, World Trade Center East, Two Seaport Lane, Boston, MA 02210; telephone 617.406.4800 / facsimile 617.406.4501. Inquiries and information for publication are welcome.

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