Legal news & views

Issue: VII May 2013

Dear Patty,

Thank you for reading **news & views** from Kenney & Sams, P.C. We value your time and promise to keep the content brief, educational and direct. If you would like to discontinue receiving this type of communication, please unsubscribe below.

ARC Trial Victory

Mike Sams and Ed Prisby recently achieved a major victory in the trial of a land use dispute. Our client, Aquacultural Research Corp. ("ARC"), New England's largest shellfish farm, brought suit against the Old King's Highway Historic District Commission and a visual abutter. ARC sought a "Certificate of Appropriateness" under the Old Kings Highway Historic District Act authorizing it to construct a 600kWh turbine on its property, which will be a significant energy cost saving measure. The case was tried

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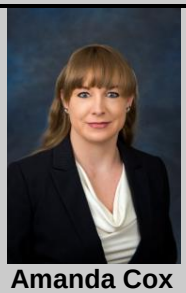

Amanda Cox Joins Kenney & Sams

Kenney & Sams, P.C. is pleased to announce that Amanda J. Cox has joined the firm.

Mandy's practice includes all areas of civil litigation, with particular experience in contract and tort work, and insurance coverage

before Judge Brian Merrick at the Orleans District Court. Kenney & Sams was able to get testimony of approximately eight (8) witnesses stipulated to.Then, following two and one-half days of testimony from several more witnesses, including Cape Cod residents and alternative energy experts, Judge Merrick granted the requested Certificate of Appropriateness.

See Lawyers Weekly Article 4.18.13

Legal Representation for Citizens Without Financial Means

Amanda Cox is presently preparing to argue issues of constitutional law before the Appeals Court of Massachusetts in June. She does so pro bono as part of an effort in the state to afford legal representation to citizens who do not have the financial ability to retain counsel. The issues in the case revolve around the trial court's dismissal of a criminal complaint sua sponte at a pre-trial hearing. The Commonwealth argues that this violated the separation of powers doctrine and public policy. Amanda will argue that the trial court may in its discretion dismiss a complaint sua sponte and without prejudice over the objection of the Commonwealth. Amanda will also argue that the judge did not abuse his discretion when he exercised his discretion in this case and did not thereby infringe upon the rights and duties bestowed upon the Commonwealth by Article 30 of the Massachusetts Declaration of Rights. The outcome of this argument is especially important for two reasons. First, it may redefine the boundaries of a judge's inherent authority to process criminal cases and exercise discretion. Second, the Appeals Court decision will determine whether the defendant must again appear in Court to defend against allegations which have already been determined to have no reasonable basis on which to proceed.

Who Are Your Teammates?
By: Michael Sams

Make sure you work with consultants who know your business, whether they be accountants, insurance professionals, or lawyers. Now, this probably is sound advice concerning any industry but from experience, I know it is especially applicable to those in the construction industry.

Just recently, I began working in defense of a client who has been

matters.

Chris Kenney Appointed to National and International Trial Tactics Committees

The American Bar Association and the International Association of Defense Counsel have both appointed Chris Kenney to serve as Vice Chair of their respective Trial Techniques Committees. Both committees focus on the development and demonstration of innovative trial technique and education on trial practice.

Maximizing Mediation Success

Kenney & Sams, P.C. is an advocacy firm specializing in obtaining the needed results for you and your client at mediation-even on short notice.

Let us help you close out your case through a successful mediation with strong, effective advocacy for your client.

sued in a personal injury matter. That client was a general contractor on a project and the allegedly injured party is someone who came onto the site to perform distinct work, outside the scope of my client's project work. My client had not subcontracted with that person and had no supervisory role over her. Specifically, she was hired by either the home owners or the architect to do some decorative type of painting in a part of the house, as my client was on the verge of completing punchlist work for the remodeling work he performed. Unfortunately, it appears that this painter erected her own staging and then put a ladder on top of the staging to reach an even higher point inside the house. She fell, allegedly incurred injuries, and now is suing my client, even though my client did not hire her and her work was not part of my client's contracted requirements.

Setting aside the frustrating issue that my client should not have been sued at all where it owed this woman
no duty, is the fact that my client's insurer is disclaiming coverage.

The insurer is disclaiming coverage because of the existence of an exclusion endorsement in the insurance policy that, if taken to mean what the insurer asserts, would mean the exclusion gutted almost all coverage for personal injuries during the course of the project. Now, we certainly disagree with the insurer's broad reading of the insurance policy endorsement but the endorsement does provide some expanded exclusions to coverage for personal injury claims. Moreover, my client's insurance agent never informed my client that this exclusion had been added to the policy.

My client's insurance agent's handling of this matter highlights the importance of having an agent who knows the construction business, and avoiding those without expertise in the area. An agent who knows the construction business would not obtain a policy with an exclusion endorsement that limits coverage for personal injury claims during the course of the construction project---at least without reviewing and confirming with the client that it wants this exclusion in the policy. Moreover, a knowledgeable agent would advise the client that a general liability policy is intended in large part to provide coverage for personal injuries (in addition to property damage claims) and that, therefore, when one adds an endorsement that excludes certain personal injury claims, the purpose for having the general liability policy is being hindered.

Unfortunately, my client's agent apparently did not specialize in working with contractors and, perhaps, failed to recognize the importance of his conduct in obtaining an endorsement such as this. As a result, the client, rather than the insurer, is paying for its legal defense and unless/until a court tells the insurer that coverage exists for the specific claim asserted in this case, would have to satisfy any future judgment that might enter against it in this case.

The lesson here is to make sure that your consultants know your business and understand the importance of your insurance,

NOTEWORTHY SUCCESSES

Mike Sams and **Adam Ponte** recently negotiated a settlement agreement between two of the country's largest construction demolition companies. Our client, a California based demolition and remediation outfit, subcontracted with a Massachusetts contractor to perform demolition and asbestos remediation work on two local projects. Although the work was properly completed, the defendant contractor refused to pay over $250,000 owed to our client. After filing a complaint and obtaining attachments in both Massachusetts and Maine, we reached a settlement agreement only four months after initiating the litigation.

Chris Kenney and **Ryan Menard** recently staved off a lawsuit against a Colorado company brought into court in Massachusetts. Our client, a lender specializing in insurance premium financing, was sued by a former debtor alleging that the lender wrongfully requested cancellation of his insurance policy after the debtor defaulted on his loan repayment. Just three months after the debtor served his complaint against our client, Attorney Kenney and Attorney Menard convinced the debtor to voluntarily

accounting, and your contracts. You work in a specialty area and you should have teammates with specialized knowledge of that area.

Getting Paid on Public Construction Jobs: Payment Bond Claims

By: Adam Ponte

This month's article concerns some basic rules that can maximize subcontractors' ability to get paid. Subcontractors must understand Massachusetts law concerning public construction payment bonds. By asserting a proper bond claim, a subcontractor may encourage the general contractor to pay because of the latter's obligation to indemnify the surety should it be forced to compensate the unpaid subcontractor. To bring an effective bond claim, the subcontractor must be aware of its relationship with the general contractor furnishing the bond and satisfy certain timeliness requirements.

A. Background and Purpose.

Under G.L. c. 149, § 29 (the "payment bond statute"), general contractors on public construction projects valued over $25,000 must provide the project owner with a payment bond to secure payment to subcontractors who furnish labor and materials. The payment bond statute applies to any project for the "construction, reconstruction, alteration, remodeling, repair or demolition of public buildings or other public works" for any town, city, county, district or "other political subdivision of the commonwealth or other public instrumentality." G.L. c. 149, § 29.[1] The statute further requires that the bond be valued in an amount not less than one half of the total contract price on the public project. The state legislature created this requirement in part to ensure that subcontractors get paid for their work on public projects because subcontractors are prohibited from filing mechanic's liens on public property.

If you are a subcontractor, or even a third or fourth-tier subcontractor on a public construction project in Massachusetts, and the general contractor has failed to pay you in full for work or materials provided, you can potentially seek the benefit of the project's payment bond. This is unlike payment bonds for federal construction projects. The Miller Act (40 U.S.C. §§ 3131-3134) governs federal construction bonds and permits recovery only to first and second-tier subcontractors. In contrast, Massachusetts law allows subcontractors - at any level - to recover under a payment bond on a public construction project. There are, however, critical deadlines that subcontractors need to be aware

withdraw all of his claims against our client with no money paid and no fees incurred drafting dismissal motions.
and

Mike Sams and **Adam Ponte** recently obtained a $250,000 judgment in Essex Superior court against a New York Demolition company after it failed to pay our client, an asbestos remediation outfit, under a time and materials contract. After complex discovery proceedings, the Court ruled in our client's favor on summary judgment.

MBA

Mike Sams participates in Masschusetts Bar Association's 2013 Law Day Education Program.

The MBA works closely with high schools and students across the commonwealth on various civic and educational initiatives. Each May, in celebration of Law Day, the MBA coordinates a program that sends an attorney and judge to various high school history and/or political science classes to engage student's on a specific topic.

MASS DLA
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

Chris Kenney was a featured speaker at a Joint MassDLA-MATA program entitled "Both Sides of the Bar." The educational program featured 5 speakers from both sides of the bar giving their best

of to perfect their bond claim.

B. Timeliness Requirements.

A first-tier subcontractor - a subcontractor with a direct contractual relationship with the general contractor - is not required to provide any notice of its bond claim. As long as the general contractor has failed to pay the subcontractor within 65 days after payment was due, the subcontractor is permitted to file suit in Superior Court to enforce the bond.

On the other hand, a subcontractor that does not have a direct contractual relationship with the general contractor, such as a sub-subcontractor, must provide written notice of its bond claim to the general contractor within 65 days after the date when the subcontractor last performed work on the project. Massachusetts courts strictly construe the 65 day notice requirement for lower-tier subcontractors because it protects the general contractor from double payment. See Barboza v. Aetna Cas. & Sur. Co., 18 Mass. App. Ct. 323, 328, (1984). For example, if a general contractor paid its first-tier subcontractor, which then failed to pay a second-tier subcontractor, the general contractor could still be liable for the payment bond claim.

If the subcontractor is not paid in full for its work within 65 days after payment was due, and it provided written notice within 65 days after it last performed work, the subcontractor may file suit to recover on the bond. All subcontractors and vendors must file suit to recover on the bond within one year after last performing work or furnishing materials on the project. See G.L. c. 149, § 29. This one-year period accrues from the date when the subcontractor fully completed its work. It does not run from the date of substantial completion, or the date from which a particular portion of the work was completed but not paid for.

C. Substance Of The Claim

Massachusetts law does not provide explicit instructions as to the subcontractors' form of notice. Essentially, notice must be sent to the general contractor by certified mail and "stat[e] with substantial accuracy the amount claimed, [and] the name of the party for whom such labor was performed . . . ." G.L. c. 149, § 29. Besides requiring the subcontractor to state the amount claimed and the name of subcontractor for whom the work was performed, G.L. c. 149, § 29 "does not prescribe the form of the required notice." Bastianelli v. Nat'l Union Fire Ins. Co., 36 Mass. App. Ct. 367, 368-69 (1994).

D. Conclusion.

Subcontractors who understand the basic rules of the payment bond statute will be able to effectively assert claims against public project bonds and perhaps avoid litigation altogether. After satisfying the notice requirements and providing the surety with

seven minutes on trial techniques, anecdotes and advocacy tips.

Mike Sams chaired an event, "Increasing Diversity in Our Practice," for the Massachusetts Defense Lawyers Association.

Many area attorneys and law students came together to hear a distinguished panel of experts speak about diversity in the practice of law.

UDLA Utah Defense Lawyers Association

The Utah Defense Lawyers Association recently selected Chris Kenney as a keynote speaker at its annual meeting.

pertinent information supporting its bond claim, there already may be sufficient leverage to compel the general contractor to pay the amounts owed. Accordingly, by abiding by the payment bond statute's requirements, a subcontractor may get the money it deserves before entering the courtroom.

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[1] The Massachusetts Bay Transportation Authority ("MBTA") is an example of a "political subdivision of the commonwealth." G.L. c. 161A, § 2; Advanced Kiosks v. LM Holdings, 2009 WL 1448948 (Mass. Super. April 16, 2009).