

**THE  
STEELE  
LAW  
FIRM,  
P.C.**

*Representing  
Clients in  
Construction,  
Bonding and  
Commercial Law*



**Inside This Issue**

- Alternative Power Options Available in New York** 2
- Penalties for Exaggerating Lien Amount** 3
- Notice Requirements for New Hires** 3
- Recent Labor Law 240/241 Cases** 4

**On the Web at:  
[thesteelawfirm.com](http://thesteelawfirm.com)**

# THE FROST LINE

**- A Construction Industry Newsletter -**

Winter 2009

## **SUBCONTRACTORS HAVE RELIEF FROM WEST-FAIR Governor Signs Into Law Amendment Allowing Lawsuit Against Payment Bond Without First Exhausting All Other Legal Remedies**

On July 16, 2009, Governor David Paterson signed into law Ch.224/L. 2009 amending General Obligations Law Section 5-322.1 in relation to a subcontractor's or materialman's right to file a claim and/or commence an action upon a payment bond. This amendment forbids agreements in construction contracts to condition subcontractor's and materialman's rights to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy. Since the New York State Court of Appeals *West-Fair Electric Contractors v. Aetna Casualty & Surety Company* case, a pay-when-paid provision which forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in the Lien Law §34; by contract, a pay-when-paid provision which merely fixes a time for payment was found to not indefinitely suspend a subcontractor's right to payment upon the failure of an owner to pay the general contractor, and does not violate public policy as stated in the Lien Law.

The issue is the placement of the risk of non-payment of construction contract funds by the owner on the contractor. Contractors and their attorneys have been attempting to circumvent this issue and place the risk for non-payment on the subcontractor. Subcontractors and materialmen in the past were having difficulties timely filing and commencing an action on a payment bond because they first had to exhaust lien remedies or other legal remedies. This often resulted in the one year statute of limitations for commencing an action on a payment bond to expire, thus resulting in shifting the risk of non-payment from the bonding company and the contractor to the subcontractor and materialman.

Section 5-322.1 now includes the following provision: a covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to condition a subcontractor's or materialman's right to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy is against public policy and is void and unenforceable; provided that this subdivision shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer.

The amendment, which takes effect immediately, corrects a provision that was clearly against public policy. Such provision is now declared void and unenforceable.



## COMPANY PROFILE: ALTERNATIVE POWER SOLUTIONS OF NY OFFERS THE LATEST IN TECHNOLOGY TO BOTH COMMERCIAL AND RESIDENTIAL CUSTOMERS



*Photograph of a typical three-bladed wind turbine commonly used on residential projects.*

Alternative Power Solutions of NY, LLC (“APS”) has been servicing all of New York since 1999, specializing in wind, solar and generator power options. APS sells “turnkey” systems for wind turbines, solar electric, solar hot water and on demand generator products to residential, agricultural and commercial customers. APS addresses and coordinates site location, zoning regulations and permit requirements, incentives and grants, installation and warranty.

With the growing trend of “green building” and market demand for maximizing on alternative energy sources, APS is taking the market by storm in offering the latest in alternative power to both commercial and residential users. Currently, APS has exclusive dealership agreements with and is an authorized dealer of products from Bergey Windpower, SunWize Solar Products, SunMaxx Solar Hot Water Heating Systems and also installs and services Guardian/Generac standby generators.

Owen Pugh, CEO of APS, explains the process from inquiry to installation of a solar or wind system: “After the customer makes the initial contact to ask about the various systems offered by APS, APS conducts a site visit with the customer to assess the solar or wind potential and to determine possible sites for the system. As required by the State or local ordinances, APS will determine possible locations for the system, Review current electrical usage, discuss any permits, licenses or agreements that may be necessary, and any incentives or tax rebates that may be available.” Mr. Pugh also stresses that there is no fee for APS to conduct a site visit, and to provide a site analysis, system design and estimate. “After the site assessment, APS produces a proposal with a cost estimate, as well as a full system design. APS is more than willing to produce several estimates based on the customer’s anticipated budget and needs.” Another added service APS provides to its customers: “APS gathers all information required by New York State and submits a complete information package to the appropriate agency for purposes of incentives. The customer does not have to worry about submitting the wrong form or information and risk losing the great incentives available, we do it all for our customers.”

As for insights into the future, Mr. Pugh commented that “one day, the technology will be readily available for everyone to use, at a minimal cost.” Mr. Pugh also commented on the advances in solar technology. “The U.S. Department of Energy’s National Renewable Energy Laboratory has made a solar cell that uses extremely thin layers of semiconductor material applied to a low-cost backing such as glass or stainless steel sheets. These thin-film cells require less energy to make and can be fabricated by a variety of processes. Because of this, these thin-film cells provide a promising path for providing more affordable solar cells especially for residential uses. The cells are of interest for space applications and the portable electronics market because of their light weight. But where the buzz is being generated is with photovoltaic roof shingles, windows and siding.” Mr. Pugh also notes that the thin-film solar cells compete with the efficiency of the more common silicon-based solar cell.

APS offers on-site consulting and load analysis, system designs, and installation, as well as post-installation technical assistance and service. For a free quote or additional information, please contact Owen Pugh, CEO of Alternative Power Solutions of NY, LLC at (315) 402-0320 or visit online at [www.alternative-power-solutions.com](http://www.alternative-power-solutions.com).



**“Thin-film cells provide a promising path for providing more affordable solar cells especially for residential uses . . . photovoltaic roof shingles, windows and siding.”**



**PERCENTAGE-OF-COMPLETION METHOD TO CALCULATE DAMAGES FOR BREACH OF CONTRACT REJECTED BY COURT**

**Reminder To Contractors Of The Penalty of Exaggerating Amount Of Mechanic's Lien**

A construction company brought a lawsuit for breach of contract and to foreclose a mechanic's lien. The court rejected the construction company's use of a percentage-of-completion method to calculate its damages. The court found that the construction company failed to establish that it substantially completed the construction project as a whole, which was terminated in its early stages and the contractor was only on site for two months. The court also rejected the percentage-of-completion method to determine the construction company's damages because the construction company improperly included the work of its subcontractors even though the construction company had not paid them. Instead of the percentage-of-completion method to determine damages, the court used the construction company's payroll records, the cost of its materials, and applied an 8% profit percentage, which was based upon expert testimony that it was the industry standard. The court rejected the construction company's calculations of lost profit based upon 45% and 60% of the contract price.

Further, the court found that the construction company willfully and intentionally exaggerated its mechanic's lien by 700% based upon the use of the percentage-of-completion method to calculate damages, the fact that the construction company included in its damages work of its subcontractors that the construction company had yet to pay, and the construction company's own documentation evidencing the amount of work performed to date. The court found that it was inescapable that the construction company knew at the time of asserting its mechanic's lien that the amount due in the lien was untrue. The court voided the lien and assessed the construction company a civil penalty pursuant to Lien Law §39-a. *Abra Construction Corp. v. 112 Duane Associates, LLC*, 59 A.D.3d 263, 873 N.Y.S.2d 574 (1st Dep't. 2009).

**LABOR LAW ALERT:  
EMPLOYERS MUST NOW GIVE NOTICE TO EMPLOYEES OF TERMS AND CONDITIONS OF EMPLOYMENT**



Effective October 26, 2009, employers are to give written notice of the rate of pay and the regular pay day upon hiring of a new employee on or after this date, and receive written acknowledgment of the notice from each employee. Also in this written notice, the rate of overtime pay must be set out.

Currently, Labor Law Section 195(1) requires employers to notify employees at the time of hiring of their rate of pay and the employer's regular pay day. With the new law, employers are now to disclose this information in writing and include the employee's regular and overtime hourly wage rates. Many employees who are covered by New York's wage and hour laws are paid on a weekly basis, making it difficult for them to discern what the overtime rate of pay should be. This new requirement will allow both the employee and the Commissioner of Labor to compute the overtime rate to which the employee is entitled. The new law also requires that the employer obtain a written acknowledgment from the employee regarding receipt of this notification. These changes are designed with the purpose to ensure that employees understand a critical feature of the employment relationship with their employers and are aimed at preventing confusion between an employer and employee regarding hourly wage rates their employers agreed to at the time of hiring, including the proper overtime rate.

## **RECENT NEW YORK LABOR LAW 240/241 CLAIMS**

Once again New York Courts have been busy addressing various §240/§241 labor law claims and still manage to leave undecided issues for the New York construction industry. Here are just a few cases in brief from the 2009 term:

**-Unsafe Equipment:** The plaintiff was injured while using a portable hand held power tool called a “grinder”. The plaintiff sued the property owner under Labor Law §241(6). The plaintiff claimed that he lost control of the tool because it was missing a removable side handle which was not available on the day in question and that his foreman forced him to use the tool despite his protests. The Court of Appeals found that the law applicable to this case, 12 NYCRR 23-9.2(a), is specific: “Upon discovery, any structural defect or unsafe condition in such equipment shall be corrected by necessary repairs or replacement.” However, the Court left open for the trial to decide is whether 12 NYCRR 23-9.2(a) is applicable to hand held power tools such as the one the plaintiff was using when he was injured. *Misicki v. Caradonna*, - N.E.2d- -, 12 N.Y.3d 511 (Ct. Appeals 2009).

**-Falling Object and Falling Worker:** A plaintiff was injured when he and his coworkers were moving a large reel of wire between two levels in a basement hallway of a commercial building. There was a four step difference in height between the two levels. To bridge the four step difference in height between the two levels, the plaintiff and his coworkers devised a makeshift pulley system whereby they used a rope to lower the reel down the steps. The plaintiff, while holding the rope at the top of the steps, was drawn forward into a pipe that the crew had placed across the hallway door as part of the makeshift pulley system. The Federal Court found that there were unsettled questions in New York as to whether Labor Law §240(1) is limited in application to “falling object” and “falling worker” cases. The Federal Court asked the following questions to the New York Court of Appeals for answering: (1) Where a worker who is serving as a counterweight on a makeshift pulley is dragged into a pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs, causing an injury to plaintiff’s hand, is the injury (a) an ‘elevation related injury,’ and (b) directly caused by the effects of gravity, such that section §240(1) of New York’s Labor Law applies?; and (2) If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under section §240(1) of New York’s Labor Law? *Runner v. New York Stock Exchange, Inc.*, - N.E.2d- -, 12 N.Y.3d 892 (Ct. Appeals 2009).

**-Fall from Height:** A plaintiff was injured while off-loading drywall from a platform. The platform had been raised to an open second story window. The incident occurred when the plaintiff, who was able to grasp the top and bottom corners of the panel while standing on the floor in the building, was struck in his back by the panel as he was pulling it through the open window. The plaintiff brought a Labor Law §240(1) lawsuit. The Court found that the plaintiff was not subject to an elevation-related hazard because the platform from which he was off-loading the dry-wall panel was at the same level as he was. *Garcia v. Edgewater Development Company*, 61 A.D.3d 924, 878 N.Y.S.2d 134 (2d Dep’t. 2009).

**-Fall from Height and Hazardous Condition:** A plaintiff, while working on a construction project for Staten Island Rapid Transit Operating Authority, was injured when he slipped and fell down a slope abutting railway tracks when a tree stump that he was using to balance himself gave way. The plaintiff brought a lawsuit and sued under Labor Law §240(1), Labor Law §241(6), Labor Law §200, and common law negligence claims. The Court found that the accident did not involve the type of elevation-related risk covered by Labor Law §240(1). The Court also found that the Plaintiff failed to establish that the defendants had both control over the work site, and actual or constructive notice of the alleged hazardous condition. *Settimo v. City of New York*, 61 A.D.3d 840, 878 N.Y.S.2d 89 (2d Dep’t. 2009)

**-Fall from Height and Unsafe Condition:** The plaintiff, an electrician, was injured while walking on a raised computer floor when one of the tiles suddenly dislodged. The plaintiff’s right foot fell through the exposed 2x2 foot opening and struck the concrete floor 18 inches below. The plaintiff sued the owner and general contractor under Labor Law §240(1), Labor Law §241(6) and Labor Law §200, and for common law negligence. The Court dismissed the lawsuit. The Court found that Labor Law §240(1) was inapplicable because plaintiff’s injury that he sustained while walking on the permanently raised computer floor was not an elevation-related hazard of the type contemplated by the Labor Laws, and did not require the type of safety devices enumerated in the law. The Labor Law §200 claim and the common law negligence claim were dismissed because the plaintiff failed to submit any evidence to



show that the owner and the general contractor either had notice of the alleged hazardous condition or that they directly controlled and supervised the electrical work being performed. Lastly, the Court found that the plaintiff's Labor Law §241(6) claim, predicated on 12 NYCRR §23-1.7(b)(1) [hazardous openings], is inapplicable under the circumstances presented because the "opening" and the 18 inch drop were not sufficiently hazardous for the application of the cited Industrial Code provision. *Romeo v. Property Owner (USA), LLC*, 61 A.D.3d 491, 877 N.Y.S.2d 48 (1st Dep't. 2009).

**-Falling Object and Exposure to Hazards:** The plaintiff was injured while installing a vertical drainpipe on the exterior of a building. The incident occurred when a bracket, which had been used to affix the pipe near the roof of the brick building, dislodged and fell, striking the plaintiff. Despite having told his supervisor earlier that day that two brackets had fallen from the building because the brackets were of the wrong size, he continued to work without a hard hat in an area which did not have any overhead protection. The plaintiff brought an action against the owners under Labor Law §240(1) and Labor Law §241(6) predicated on violations of 12 NYCRR 23-1.7(a)(1) [overhead protection in places normally exposed to falling material or objects] and 12 NYCRR 23-1.8(c)(1) [persons working within any area where there is a danger of being struck by falling objects or materials shall be provided with and required to wear an approved safety hat]. The Court granted the defendants' motion for summary judgment dismissing plaintiff's claims under Labor Law §240(1) and Labor Law §241(6). When liability under Labor Law §240(1) is based upon a falling object, it is dependent upon establishing that, at the time the object fell, the object was being hoisted or secured, or "required securing for purposes of the undertaking," and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute." Workers cannot sue in situations where the object that falls is part of a building's permanent structure. Here, because the bracket that fell had already been installed and was part of the building's structure, Labor Law §240(1) cannot be invoked. However, because the plaintiff raised an issue of fact as to whether there was a "danger" that he would be struck by a falling bracket based upon his reporting to his supervisor that two brackets had fallen earlier that day, liability under Labor Law §241(6) predicated on 12 NYCRR 23-1.8(c)(1) remains to be a viable lawsuit. In contrast, Labor Law §241(6) predicated on 12 NYCRR 23-1.7(a)(1) cannot be invoked, because the fact that two brackets had fallen earlier in the day is insufficient to find that the plaintiff's work site was "normally exposed" to falling brackets. *Marin v. AP-Amsterdam 1661 Park LLC*, 60 A.D.3d 824, 875 N.Y.S.2d 242 (2d Dep't. 2009).

**-Fall From Height:** The plaintiff, who was hired to replace the roof of a motel, was injured while trying to secure a tarp on the roof. The incident occurred when a second-floor balcony railing against which the plaintiff was leaning broke, causing the plaintiff to fall 10 feet to the parking lot pavement below. Plaintiff moved for summary judgment under Labor Law §240(1), contending that the balcony functioned as a de facto scaffold or the equivalent of a safety device. The Court granted plaintiff's §240(1) summary judgment motion but on different grounds. The Court found that the plaintiff's use of the balcony, which was a permanent appurtenance to the building, did not constitute the functional equivalent of a scaffold or other safety device within the meaning of §240(1). However, because the balcony constituted an elevated worksite, which required the use of one of the safety devices enumerated in the statute to enable the plaintiff to place the tarp on the roof in safety, liability was properly imposed. *Yost v. Quartararo*, -N.E.2d -, -N.Y.S.2d - (3rd Dep't. 2009).

These cases serve as a continual reminder that safety and training is key to minimizing not only injuries sustained on a construction project, but also reducing the risks of increased insurance rates and costs associated with litigation and interruption to business. Let these cases serve as a reminder to carefully review your construction contracts to ensure that the appropriate indemnification and hold harmless provisions are set out with respect to actions by those who are not under your control and supervision, and that third parties provide the necessary and proper insurance coverage under their contracts.

**THE  
STEELE  
LAW FIRM,  
P.C.**

*Representing Clients in  
Construction, Bonding  
and Commercial Law*

**On the Web at:  
thesteelclawfirm.com**

949 County Route 53  
Oswego, New York  
13126

Phone: 315-216-4721  
Fax: 315-216-6065

Email:  
ksteelcl@thesteelclawfirm.com

*This newsletter is not  
intended to provide  
specific legal advice.*

*Contact your attorney  
with any questions  
you may have.*

***Who We Are At The Steele Law Firm . . .***

We are lifelong residents of Upstate New York. We grew up here, went to school here, had our first jobs here and started our families here. We know firsthand about the unique needs of those who do business in Upstate New York and the daily fight to survive in this sensitive economic scene. We are devoted to continuing our contribution to the development and growth of Upstate New York and the businesses here. We maintain a 24/7 attitude - available to our clients at all times. Whether we are your litigators, your mediators, or your sounding board, our diverse backgrounds allow us to successfully act in a multitude of roles and achieve the best possible results for our clients. Call or visit us to learn more about *The Steele Law Firm* and the services we provide to the construction, bonding and commercial industry.

**UPCOMING EVENTS**

*Kimberly A. Steele, Esq. has been asked by the Lorman Education Services to speak at a Judgment Enforcement Seminar in Syracuse, New York on March 24, 2010. This introductory seminar is ideal for CFOs, office managers, and account collection departments, and covers issues such as making demands, filing lawsuits, bankruptcy, and disputes with other creditors.*



*New Year's Resolution for your business: Update your corporate books and business filings. Too often business owners let these items lag, resulting in potential compliance issues. The Steele Law Firm is able to assist you in these tasks and bring your corporate books current!*

**WISHING YOU AND YOUR FAMILY A  
WONDERFUL HOLIDAY SEASON  
AND A MOST SUCCESSFUL 2010!**



If you wish to be removed from the mailing list, please contact The Steele Law Firm, P.C. at 315-216-4721.