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## Court Rejects Application of Subcontract's No-Damages-for-Delay Clause

A recent Massachusetts Superior Court decision refused to enforce a subcontract's no-damages-for-delay clause and allowed a subcontractor to recover lost productivity damages caused by the general contractor's failure to properly manage and coordinate the project. In rendering the clause unenforceable, the Court relied heavily upon the general contractor's refusal to grant the subcontractor a time extension to address issues caused by the general contractor's own failings. The decision is significant in that it also draws a distinction between "delay damages," which were precluded by the clause, and "lost productivity damages," which the Court found were not covered by the clause's prohibition.

In *Central Ceilings, Inc. v. Suffolk Construction Co. et al.*, C.A. No. SUCV2006-04129 (Mass. Super. Ct. Dec. 19, 2013), the Court relied upon the familiar Massachusetts Supreme Court ruling in *Farina Bros. Co., Inc. v. Commonwealth*, 357 Mass. 131 (1970), where the Court refused to enforce a no-damage-for-delay provision against a subcontractor because the general contractor failed to grant the subcontractor an extension of time for project delays caused by the general contractor. The *Farina* Court held that the general contractor breached the parties' agreement because it deprived the subcontractor of its "contractually mandated remedy" for such delays. See also the recent Superior Court decision in *XL Specialty Ins. Co. v. Commonwealth*, 2013 WL 56123 (Suffolk Super. Ct. Jan 3, 2013).

Had the *Central Ceilings* Court stopped there, the decision would have been unremarkable; however, the Court also narrowly construed the clause by distinguishing between damages resulting from "delays" and damages resulting from "lost productivity." The Court reasoned that the subcontractor's injury arose not from delays but as a result of having to provide an increased workforce to accommodate the general contractor's mismanagement of the project and compressed schedule. (The subcontractor alleged that the general contractor's failure to properly coordinate the project's trades and maintain heat and climate control resulted in frozen pipes, flooding, and leaks, forcing the subcontractor to remove and reinstall work that had already been completed.)

In reaching this decision, the Court distinguished its conclusion from the holding in *Reynolds Bros., Inc. v. Commonwealth*, 412 Mass. 1 (1992), which stands for the proposition that delays to a subcontractor's completion of its work caused by the hindrances and interferences of the general contractor or owners are barred by no-damage-for-delay clauses. The Court held that, unlike in *Reynolds*, in this instance the contractor's failure to coordinate the project and grant the subcontractor time extensions did not affect the subcontractor's "ability to complete its work on time...but rather,...its ability to complete its work on budget."

The *Central Ceilings* Court also upheld the subcontractor's "total-cost" methodology of calculating

damages and determined that the popular measured-mile approach did not apply. Without drawing a distinction between the disfavored total-cost method and the more accepted modified total-cost method, the Court held that the subcontractor's original bid estimate was reasonable and that the use of the total-cost method was reasonable in situations such as this, where the general contractor's misconduct affected all aspects of the subcontractor's performance, thus making the more preferred measured-mile approach impossible to apply.

Given this recent decision, owners, contractors, and subcontractors should pay close attention to the language set forth in the no-damage-for-delay clauses. In particular, they should be aware that in Massachusetts such clauses may be strictly construed to allow recovery of loss productivity damages in instances where the owner or general contractor causes delays on the project and refuses to grant requested time extensions to the affected contractors and subcontractors.

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